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SUPREME COURT OF THE UNITED STATES.

No. ~~498.~~ ~~218~~ 29

ELIZA DAVIS, WIDOW OF MINOR KENNER, DECEASED, ADMINISTRATRIX OF THE ESTATE OF MINOR KENNER, AND TUTRIX OF HER MINOR CHILDREN, APPELLANT,

vs.

MYRA CLARK GAINES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 1, 1878.

Post

Advanced

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½ United States circuit court, district of Louisiana.

MYRA CLARK GAINES
versus
P. H. MONSSEAUX, MRS. ELIZA KENNER, ET AL. } No. 3663.

J. D. Rouse, solicitor for Mrs. Eliza Kenner.
Wm. Reed Mills, solicitor for complainant.

1 *Bill of complaint.—Filed Nov. 22d,* 1865.

United States circuit court, district of Louisiana. In equity.

MYRA CLARK GAINES
versus
P. H. MONSSEAUX, MRS. ELIZA KENNER, ET AL. } No. 3663.

To the honorable the judges of the United States circuit court, sixth circuit and eastern district of Louisiana, sitting in equity:

Myra Clark Gaines, a citizen of the State of New York, residing in Brooklyn, in said State, brings this, her bill in equity, against the following defendants, each of whom is a citizen of the State of Louisiana, and residing in said eastern district thereof, to wit:

P. H. Monsseaux,
A. D. Doriocourt,
Jules Lapiere, alias Lapene,
W. F. Vredenburgh,
N. Rillieux,
J. G. Pelhofer,
W. Laurans,
Henry Spizefaden,
Jules Banduc,
Joseph Bermond,
Jaques Phillippe Moreau,
W'd Auguste Lanusse,
John Brietry,
2 F. Gabriel Levasseur,
Stanislaus Weber,
J. T. D. Lefebre,
Marcelin Esnard,
J. B. Robertson,
Wid. M. Gubarsche,
Barthelemy Moreno,
Nancy Villars,
Lilette Boneuguier, alias Bonseigneur,
F. M. Jacobs,
Marcelin Bethencourt,
Wid. Raymond Loseul,
Wm. Moran,
Michel Meilleur, jr.,
P. Avril,
Jacob Newhouser,
Raymond Rousselot,
D. B. Macarty,
Wid. B. Duracker,
Joseph Dangel,
John Despeaux,
Jno. Augustus Blacksmith,
Henry Peter,
Joseph Bazanac,
Ferdinand Tomson, alias Thompson,
Joseph Abadie,
Martin Gruff,
Etiene Parsscell,
J. M. Tourne,
C. Morel,
Geo. Prinschop, alias Geo. Bischoff,
Auguste Gautier,
W. H. McLean,
L. J. E. Mace,
Albin Soulie,
Joseph Hernandez,
Alex. M. Agelasto,
Augustus St. Amant,
Julius Dumant,
Wid. Pierre Cap,
John Pemberton,
José Sabatis,
Louis Barnett,
Dennis Cronan,
Victorine Demoruelle,
Felix A. Ducros,
David Stickney,
Priere Minville,
Joseph Fumegano,
Fulcrum Randon,
J. P. Perez,
Barthelemy Morisco,
J. B. Jacquet,
Jules Bermudez,
P. Avegno, jr.,
Jules Lavergne,
Joseph Oscar Theard,
Victor Cerosselles,
M. Theral, alias Cheval,
A. Cubicke,
Aimee Gautier,
Joseph Dubac,
J. F. Bigot,
J. F. B. Courbet,
Joseph Fuentes,
Pierre Lamarlere,
R. Devoe,
L. Attenet,
J. Dupasse,
Adele Mongin,
Theodore Guyol,
John L. Gubernator,
J. P. Siffrent,
Jean Allie,
Wid. J. Juliet Keny, alias Reny,

Owen Doherty,
Margaret McLaughlin,
Wid. J. C. de St. Romes,
Louis Aron,
Joseph Desplaux,
Geo. Lohr,
Peter Mulier, alias Muller,
Francois Lacroix,
Joseph Diard,
Albin Rochereau,
Francis Mouny,
Robert J. Kerr,
Isidore Eugene Pinsard,
Josephine Hoa,
Joseph Guilot,
Henri Larqui,
Florille Foy,
McDonough School Fund,
Simon Edward Brunett,
J. B. Muilhe, alias Mailhe,
Geo. Oscar Reinecke,
Henry Parlange,
Francois Roumieu,
John Johnson,
Louis E. Nie,
Arthur B. Griswold,
John and Jas. C. Davidson,
John Hoey,
B. Abadie,
A. Boeto.

Maria M. Doriocourt, tutrix of Maria Doriocourt, a minor, Joseph Doriocourt, Francis Doriocourt, Andree Doriocourt.

Aimee Rousseau, Alfred Rousseau, testamentary executor of the will of Rodolphe Rousseau.

V. Bouligny, Mary Bouligny, his wife.

Antoine Favre Nicolin, curator of the succession of Charles Selinger.

Bernard Avegno, testamentary executor of the estate of P. Avegno.

Mrs. Pierre Oscar Peyroux and her husband, whose name is to your oratrix unknown.

Mrs. Francis Joseph Bauduc and her husband, whose name is to your oratrix unknown.

Mrs. Pauline Brietry and her husband, whose name is to your oratrix unknown.

Mrs. J. B. Marmsout and her husband, whose name is to your oratrix unknown.

Mrs. Ellen Phillips and her husband, whose name is to your oratrix unknown.

Mrs. Celina Bavant, alias Ravenat, and her husband, whose name is to your oratrix unknown.

3 Mrs. Bazanac and her husband, whose name is to your oratrix unknown.

Mrs. Celina Magner and her husband, whose name is to your oratrix nknown.

The Southern Star Manufacturing Company, a corporation established by the laws of Louisiana and doing business in New Orleans.

Mrs. Charles Havenard and her husband, whose name is to your oratrix unknown.

Mrs. Jeremiah Scanlan and her husband, whose name is to your oratrix unknown.

Mrs. Henry St. Paul and her husband, whose name is to your oratrix unknown.

Emma L. Walton and her husband, whose name is to your oratrix unknown.

Mrs. Septima Moral and her husband, whose name is to your oratrix unknown.

Mrs. Simeon Delord and her husband, whose name is to your oratrix unknown.

Mrs. Jean Sauvage and her husband, whose name is to your oratrix unknown.

The Canal Carondelet Navigation Company, a corporation established by the laws of Louisiana and doing business in New Orleans.

The Hope Insurance Company, a corporation established by the laws of Louisiana and doing business in New Orleans.

Antoine Surrat, Minor Kenner, Willis P. Coleman; E. Palmyre White, D. Prieur White, Geo. White, Athie White, Octavia White; N. P. Fisher and his wife; P. Augrain and his wife; S. Howell and his wife; H. D. Hopkins and his wife; John M. Brown; Eliza Davis Kenner, administratrix of the estate of Minor Kenner, and tutrix of Daniel Kenner, Maria Kenner, Oxley Kenner, her minor children.

C. W. Hopkins, Mrs. Vance and her husband, J. G. Reiser, Jules Burmudas, Jules Lapiere, Louis Benocks, Dennis Cronan, J. B. Patrick, Martin Soye, Mrs. Saliba, administratrix of the estate of Joseph Saliba, A. Miltenberger, J. A. Blanc, W. Hogan, Edward Barnett, George Griser, alias Giseler, heirs of H. Lavergne, F. Hubert, John Sabie, alias Sable, Michael Lorenz, Jean Cazeneau, Alphonse Drez, Armand Pauzane, Louis Mestier, Pangrere Wicker, John Miller, Henry Lorenz, Michael Dennis, Henry Grandmont, Charles Petrie, Miss M. A. Levassier; the Pontchartrain Railroad Company, a corporation established by the laws of Louisiana and doing business in the city of New Orleans; the city of New Orleans, a corporation established by the laws of Louisiana.

Also, against the heirs of Paul Pesquier, who are aliens, residing in the kingdom of France, and whose names are unknown to your oratrix, but who are represented by P. Casanave, their agent and attorney, who resides in the eastern district of Louisiana aforesaid; Teresa Pene Massana, an alien, who resides in the kingdom of Spain, who has an attorney and agent, to wit, Oscar Alex, who resides in Louisiana, in the city of New Orleans, and is a citizen of said State, in said eastern district.

4 And thereupon your oratrix complains and says: That Daniel Clark, late of the city of New Orleans, in the State of Louisiana, at the time of his death, being seized in fee simple, and lawfully possessed of certain lands and negro slaves, rights, credits, and other property of great value, did, on or about the thirteenth day of July, in the year eighteen hundred and thirteen (1813), duly make, execute, and publish his last will and testament in writing; and thereupon, amongst other things, acknowledged your oratrix to be his legitimate and only child, and bequeathed to her all the estate, whether real or personal, of which he might be possessed, subject only to the payment of certain legacies thereinafter named. And that the said testator did, in and by his last will and testament, constitute and appoint Francois Dusuau de la Croix, James Pitot, and Joseph D. D. Bellechasse, executors thereof, and did also appoint and constitute the said de la Croix tutor to your oratrix. And that the said testator departed this life on or about the sixteenth day of August, in the year 1813, not having revoked or annulled the said will and testament, or the provisions therein for the benefit of your oratrix as aforesaid, but leaving the said will, and every part and portion thereof, in full force and effect. And after the death of the said testator, to wit, on or about the eighteenth day of January, 1855, your oratrix applied to the second district court of New Orleans (the court having jurisdiction of such matters) for the probate of the said will; that upon the hearing of the application of your oratrix the said court rejected the same. That afterwards, in due time, the said cause was appealed to the supreme court of the State of Louisiana. Whereupon, after due proceedings, the said supreme court reversed the judgment of the said second district court, and proceeding to render such judgment as should have been rendered by the lower court, ordered, adjudged and decreed that the said will of Daniel Clark, dated July 13th, 1813, as set forth in the petition of your oratrix, be recog-

nized as his last will and testament, and that it be received, recorded and executed as such; that on the 23d day of February, 1856, the mandate of the said supreme court was filed and recorded in the said second district court, and the said will was duly recorded in the book of wills of said court on the 23d day of February, 1856, in book 10, p. 307; all of which will more fully appear from a copy of said will, and the probate thereof, as follows:

Succession of Daniel Clark.

STATE OF LOUISIANA:

Second district court of New Orleans.

On the application of Mrs. Myra Clark Gaines for the proof of the will of Daniel Clark, No. 8646.

Petition filed 18th January, 1855.

(Signed) OCTAVE MOREL,
Deputy Clerk.

To the honorable the second district court of New Orleans:

The petition of Myra Clark Gaines, who resides in the city and State of New York, respectfully represents, that on the sixteenth day of August, A. D. 1813, Daniel Clark, then residing in New Orleans, de-
5 parted this life, leaving no descendants except your petitioner, who is the daughter of said deceased.

That on the 13th day of July, 1813, the said Daniel Clark made his last will, which was in substance and to the effect following:

"NEW ORLEANS, *July 30th*, 1813.

"In the name of God, Amen: I, Daniel Clark, of New Orleans, do make this my last will and testament.

"Imprimis. I order that all my just debts be paid.

"Second. I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payments of certain legacies hereinafter named.

"Third. It is my desire that my friend, Chevalier Francois Dusuau de la Croix shall have the charge of my said daughter Myra, and I do appoint and constitute him tutor to her.

"Fourth. I give and bequeath unto my mother, Mary Clark, now or recently of Germantown, in the State of Pennsylvania, an annuity of two thousand dollars, which is to be paid out of my estate during her life; I further give and bequeath an annuity of five hundred dollars to Caroline Degrange, until she arrives at the age of majority, after which I give and bequeath her a legacy of five thousand dollars. * *

"Fifth. I hereby nominate and appoint my friends Francois Dusuau de la Croix, James Pitot, and Joseph D. D. Bellechasse my executors, with full power to execute this my last will, and to settle everything relating to my estate."

Petitioner further avers that the said will contained other legacies and dispositions; that said testator gave a legacy of $5,000 to a son of said Pitot, and another of $5,000 to a son of Mr. DeBuys, both of New Orleans; he also provided for the freedom and maintenance of his slave

Lubin. In his said will the said Clark made an inventory of his estate, with explanations of his business relations, and gave instructions to the said tutor, De la Croix, in regard to the education of your petitioner.

She further represents that the said will was an olographic one, wholly written, dated and signed by the testator, in his proper handwriting, and at the death of the said Clark was left among his papers at his residence. That after his decease diligent search was made for said will, but the same could not be found, nor has it been since, and it was either mislaid, lost, or destroyed; that the destruction of said will has prevented her from giving the contents thereof with any greater certainty than as set forth herein above.

Petitioner further shows that Messrs. Bellechasse and Pitot, two of the above named executors, are dead; that the said De la Croix, the other, is indisposed to accept the executorship of the said will; and that no presumptive heirs of said Clark reside in this State.

She further shows that at the decease of said Clark, and for many years after, she was a minor, wholly ignorant of her rights under said
6 will, and that after she arrived at the age of majority, and was made acquainted with the matters aforesaid, she instituted a suit on the 18th of June, 1834, in the probate court of New Orleans, for the purpose of proving the said will, but the said suit was dismissed, as in case of nonsuit, on the 8th day of June, 1836, without any fault of your petitioner.

That in the year 1836 she instituted suit by bill in chancery, in the circuit court of the United States for the eastern district of Louisiana, to set up the said will, and enforce her rights as universal legatee under the same; but that the Supreme Court of the United States dismissed her claims under the said will, as in case of nonsuit, without deciding on the merits of the cause, and without the fault of your petitioner.

Wherefore, she prays that this honorable court would fix a day, place, and hour for the proof of the said will, and after all due proceedings, such as the law requires, that the same may be recorded and its execution ordered, and for general relief, and she will ever pray, etc.

(Signed) P. E. BONFORD,
SMILEY & PERIN,
MOISE & RANDOLPH,
Attorneys for Petitioner.

Order.

Let the will within referred to be proved before me on Saturday, the 27th day of January 1855, at 10 o'clock a. m.

(Signed) J. N. LEA,
Judge.

Decree of the supreme court of the State of Louisiana.

MONDAY, *December 17th*, 1855.

It is therefore ordered, adjudged, and decreed by the court that the judgment of the lower court be avoided and reversed, and proceeding to render such judgment as should have been rendered in the lower court, it is ordered, adjudged, and decreed that the will of Daniel Clark, dated "New Orleans, July thirteenth, eighteen hundred and thirteen," as set forth in the plaintiff's petition, be recognized as his last will and testament, and the same is ordered to be recorded and executed as such;

and it is further ordered and decreed that Francois Dusuau de la Croix be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said De la Croix, and the costs of this proceeding be borne by the succession.

A true copy.

Clerk's office, New Orleans, February 26, 1856.

EUGENE LASSERE,
Clerk.

Decree of the supreme court of the State of Louisiana.

MONDAY, *February 18th*, 1856.

It is therefore ordered, adjudged, and decreed that the judgment heretofore pronounced by us in this case be amended by adding to the same words, "Reserving to said Richard Relf the right, if any he have,
7 to oppose said will in any manner allowed by law, as fully as he could have done had he not been a party to these proceedings."

A true copy.

New Orleans, February 23d, 1856.

(Signed) EUGENE LASSERE, *Clerk.*

And your oratrix further showeth unto your honors that the whole estate of the said Daniel Clark, by the laws of the State of Louisiana, and in pursuance of the said last will, vested in your oratrix, on the death of the said testator, subject only to the payment of the debts and specific legacies contained in said last will and testament. That the said defendants, on or about the day of , in the year 1839, after the death of the said Daniel Clark, and while your oratrix was a minor, took possession of and have ever since held and retained, for their own use and benefit, the following property of the said Daniel Clark, bequeathed to your oratrix as aforesaid, with the buildings and improvements thereon, and have enjoyed the rents and profits of the same ever since; that is to say:

1st. A lot of ground in the city of New Orleans, in the square bounded by Circus, Phillippi, and Poydras, as Poydras street was in 1835, being about ten feet wide and about 191 feet long on Poydras street, being the same land sold by the Carrollton Railroad Company to Municipality No. 2, by act before Joseph B. Marks, notary public, September 14th, 1836, now claimed by the city of New Orleans.

2d. A lot of ground, with all the buildings thereon, in the city of New Orleans, in the square bounded by Burgundy, St. Peter, Rampart, and Toulouse, being the lot about 60 feet on Toulouse and 120 feet deep, which lays next to lot No. 1, towards Rampart street, as by plan of Carlos Trudeau, dated January 11th, 1801, deposited in the office of P. Pedesclaux, and being next to the lot of E. H. Lameyer, conveyed to Daniel Clark aforesaid, by James Pitot, by act before P. Pedesclaux, February 24th, 1813, now claimed by Antoine Sarrat.

3d. One valuable plantation, parcel, or tract of land, situated at Kennerville, so called, in the State of Louisiana, about five leagues above the city of New Orleans, on the left bank of the river Mississippi, bounded on the upper side by lands owned in October, 1813, by Wm. Kenner, and extending in front on the Mississippi River 18½ arpents, and on the lower side bounded by lands owned in October, 1813, by Jacques Fortier, and extending in the rear, on both sides, to Lake Ponchartain, with all the improvements thereon, having been purchased by Daniel

Clark aforesaid from Stephen Henderson, for $120,000, now claimed by the widow and heirs of Minor Kenner, and Willis P. Coleman, and others.

4th. A certain tract of land, containing about 135 acres, more or less, situated in the quarter of the Bayou St. John, in the city of New Orleans, with all the buildings and improvements thereon, bounded by the canal Carondelet, Dorgenois street, Bellechase street, by land that in 1821 was owned by Mrs. Henry and Evarniste Blanc, and by the Bayou St. John, according to a plan of said land drawn by Joseph Pilié,
8 dated August 20th, 1821, annexed to an act of sale of said tract, made by Richard Relf and Beverly Chew, as executors of Daniel Clark, to Evarniste Blanc, and passed before Philip Pedesclaux, October 30th, 1821, now of record in said Pedesclaux's notarial records, said land having been acquired by the said Daniel Clark, in his lifetime, from Nicolas Maria Vidal, by act before C. Ximines or P. Pedesclaux, notary public, on or about July 24th, 1804, now claimed by * * *

(The names of these claimants are included in the list of defendants above, and are omitted for sake of brevity.)

5th. A lot of ground in the city of New Orleans, on Royal street, between St. Peter and Toulouse street, being No. 184 and 186, in 1840, on said street, and being the same described in the will of Rena LeMonier, book 6, page 421, in the records of wills for the parish of Orleans, being the same conveyed to Daniel Clark aforesaid, by James Pitot, by act before P. Pedesclaux, February 24, 1813, being 30 feet on Royal street, and 120 feet deep, and bounded, in 1813, on one side, by land of Madame Wid. Lanties, and on the other by land of Messrs. Grandschamp & Monier, now claimed by Palmyra White and her children.

6th. A tract of land, with all the improvements thereon, situated in the parish of Ascension, State of Louisiana, on the left bank of the Mississippi, 18½ arpents in front on the Mississippi, and extending back 40 arpents, purchased by Daniel Clark aforesaid, of Wm. Simpson, June 5th, 1812, by act before P. Pedesclaux, and bounded, in 1816, by lands of Beverly Chew and Richard Relf, on the lower side, and on the upper side by lands of Stephen Henderson and G. W. Destrahan, now claimed by John M. Brown.

7th. A square of ground in the city of New Orleans, bounded by Circus, Perdido, Phillippi, and Poydras streets, now claimed by the heirs of Paul Pesquier and Teresa Pena Massana.

8th. A tract or parcel of land on Gentilly road, in the city of New Orleans, lying between the Gentilly road, the canal Marigny, Treasury, and both sides of Spain street, being about 22 arpents front on Gentilly, as by plan of Allon D. Demicourt, dated April 21, 1856, now in the office of H. D. Stone, No. 18 Royal street, New Orleans, now claimed by * * *

(The name of these defendants are included in the list of defendants above, and are omitted for the sake of brevity.)

And your oratrix further shows that the particular portions and lots of said land so taken possession of and claimed by said defendants separately, the time when each took possession of the same, the title and chain of title by which each pretends to hold, the date from which they have received rents and revenues from the same, and the annual amounts of such rents and revenues, are unknown to your oratrix; that the facts touching all these matters are material to the case of your oratrix, and that the discovery of them by each of said defendants is indispensabl, as proof.

And your oratrix further shows that said Daniel Clark made a pro-

visional will in the year 1811, in which he made his mother, Mary
9 Clark, his universal legatee, and one Richard Relf and Beverly Chew his executors; that said will of 1811 was probated in the city of New Orleans and said Relf and Chew qualified as executors; that said will of 1811 was revoked by the aforesaid will of 1813; that said Chew has departed this life, and all the rights and duties of said Relf as executor have expired; that said Mary Clark, the universal legatee under said will of 1811, departed this life many years since, and all her heirs and legatees reside without the jurisdiction of this honorable court.

That James Pitot and D. D. Bellechase, named as executors in said will of 1813, departed this life before the probate thereof, that François Dusuau de la Croix, the other executor, refused to qualify as executor under said will of 1813, and is now dead, and there is now no qualified or acting executor, administrator, or curator of the estate of said Daniel Clark.

And your oratrix further showeth that she has several times applied to the said defendants to deliver to her the said property, and account for the rents and revenues of the same. And your oratrix had well hoped that the said defendants would have complied therewith, as in equity and good conscience they ought to have done.

But now so it is, may it please your honors, the said defendants, to injure and oppress your oratrix, now absolutely refuse to deliver said property to your oratrix, or to pay or account to her for the rents and revenues of the same or the interest due thereon—sometimes pretending that one Richard Relf and one Beverly Chew sold said property to the defendants as testamentary executors of a will of the said Daniel Clark, made in the year 1811, which had been admitted to probate in the probate court for the parish and city of New Orleans, and as attorneys in fact for one Mary Clark, the devisee in said will of 1811 named; and that they, the said defendants, became the purchasers of the said property for a full and valuable consideration, and without notice of any revocation or invalidity of said will, alleged to have been made by said Daniel Clark in 1811, and in which said Relf and Chew were named executors, and without notice of the rights and claims of any other person than the said Mary Clark to the said estate of the said Daniel Clark, or any part thereof. And thereupon the said defendants insist that although the said will of 1811 may not have been the last will of said Daniel Clark, yet they should not be affected thereby; and that the titles acquired by them under the sales made by the said Relf and Chew are good and proper titles, and cannot be invalidated or disturbed in any manner by the revocation of said will of 1811 by any claim or title your oratrix may have had or now has to said property or any portion thereof. And at other times the said defendants pretended to have acquired title to said property by prescription, and that the right of action of your oratrix is barred by prescription.

Whereas your oratrix expressly charges the contrary of all these pretences to be true, and that neither the said Relf nor Chew was the duly qualified executor of the said will of 1811 at the time of the said sales, and their term of office as such pretended executors expired previous to
the date of any such sales, nor did either of them act legally in their
10 assumed capacities of pretended executors of a will of the said Daniel Clark, and attorneys of the said Mary Clark; nor did they, or either of them, when acting in both or either of said assumed capacities, observe or comply with the formalities, or adopt the measure prescribed by law, to give any validity or authority to any act or acts done or assumed to

be done by them, in such assumed capacities of executors or attorneys, in relation to said estate of said Daniel Clark; that a true and faithful inventory and a just appraisement, by two duly appointed and sworn appraisers, of the real and personal estate of the said Daniel Clark had not been made according to law, by said Relf or Chew, before said sales were made; that proper and legal orders to sell were not obtained by them from the judge authorized to make such order, before said sales were made; that the said sales were made by private contract, and not at public sale, with legal notice, as the law required; that the money paid by the said defendants for said property was not a full and valuable consideration for the same; that the said Mary Clark was not seized of any interest in the said property, nor in the actual possession of any part thereof at the date of her said power of attorney, or at the date of any such sales; that said Relf and Chew had not, nor had either of them, caused themselves, or either of them, to be duly recognized, by a court of competent authority, as the attorney or attorneys of said Mary Clark; that the pretended power of attorney from said Mary Clark to said Relf and Chew was vague and general in its terms, and did not expressly authorize them, or either of them, to sell the property aforesaid, and for this purpose the said power of attorney was void and of no effect; that all the acts of Relf and Chew in relation to the said sale of the said property to said defendants were, upon the face of the proceedings, in the foregoing and many other respects, illegal, informal, fraudulent, and void by the laws of the State of Louisiana, and so they were necessarily known to be by the said defendants at the time of their pretended purchase of said property; and that the pretended will of 1811 had been revoked by said Daniel Clark and was of no validity; and that the making and existence of said last will of said Daniel Clark of 1813 were well known to said defendants at the time of their pretended purchase from said Relf and Chew, as aforesaid.

And your oratrix charges that, according to the best of her information and belief, she became of age on the 31st day of December, in the year 1827; that in tender infancy, and before the death of the said Daniel Clark, she was removed from New Orleans to Philadelphia, in the State of Pennsylvania, and was one of the family and bore the name of Col. S. B. Davis; that until about the time of her first marriage, to wit, with William W. Whitney, which was about the year 1832, she was kept in ignorance of her history, parentage, rights, and even her name; that on becoming acquainted with her parentage and rights, on or about 18th day of June, 1834, she instituted suit in the probate court of New Orleans, for the purpose of proving said last will of said Daniel Clark, but that said suit was dismissed, as in case of non-suit, on the 8th day of June, 1836, without any fault of your oratrix: that on the 28th
11 of July, 1836, your oratrix instituted suit in the district court of the United States for the eastern district of Louisiana, to set up the said will of 1813, and to enforce her rights under the same, and as heir at law of the said Daniel Clark, by will in chancery against these defendants, among others, for this and other property; that the Supreme Court of the United States in 1844 held that the said will of 1813 should be proved in the probate court of the State before any title to property could be set up under it; and her claim as heir at law finally decided against her in April, 1852; and on the 18th day of January, 1855, your oratrix filed her petition to have the said will of 1813 of the said Daniel Clark probated, which was done on the 17th of December, 1855, received and recorded in the second district court, as aforesaid, on the 23d of February, 1856.

And your oratrix expressly charges that, in the aforesaid bill in chancery, filed as above stated, July 28, 1836, and in the various supplemental bills and amendments filed thereto, which bill is known as No. 122 upon the docket of this honorable court, the mayor and aldermen of the city of New Orleans, municipality No. 1, of said city, Philip Minor, Geo. Kenner, Duncan Kenner, Raymond Massana, J. F. C. Barabino, Antoine Piernas and his wife, the New Orleans and Carrollton Railroad and Bank Company, F. H. Pettipain, and one Toledano, Charles Ceranco and Elizabeth Nagel, his wife, John Holliday and Maria Holliday, Rene LeMonier, F. X. Martin, and J. Hopkins, and all the other persons who were the pretended owners and possessors of said several tracts of land above described, were each and all of them made defendants and duly cited to answer said bill, and did appear and answer said bill, in the year A. D. 1836.

And your oratrix expressly charges, that upon the 27th day of March, A. D. 1857, she exhibited her bill in chancery, which was duly filed in this honorable court, and known as No. 2734 upon the docket of said court, against all the owners and possessors of said several tracts of land above described, in which she sought to recover from them said lands, and that they were duly cited to appear and answer said bill.

And your oratrix expressly charges that, when said suit was finally decided in April, A. D. 1852, thereafter, to wit, upon the 1st day of April, A. D. 1861, she instituted suit to recover all said land severally above described, against all the owners and possessors of said several tracts of land, at that time in the court of the Confederate States, which claimed jurisdiction of said matters, which had usurped the power that of right belonged to this honorable court, and that was the only de facto court then existing within the territory of the eastern district of Louisiana aforesaid; that all said owners were duly cited, May 1st, 1862, in said suit, to appear and answer thereto.

And your oratrix expressly charges, that on or about the 1st of May, A. D. 1875, she exhibited in this honorable court her bill in chancery in due and proper form, wherein she sought to recover each parcel of the aforesaid land of all the then owners of said land at the time, which bill was duly filed in said court, and that she verily believed all said
12 defendants, the owners thereof, were duly served with process, and that she learned for the first time about the 1st of July, 1865, that said defendants had not been so served with process because, as she was told, she had not provided funds to pay for the service thereof, which she supposed she had done, in the hands of her then attorney.

And your oratrix expressly charges that from the day she first, by accident, learned her parentage, and her rights to the aforesaid land, she has suffered no laches to intervene in her prosecution of her rights to said land; but, on the contrary, she has been persistent and diligent, unwearied and unremitting in the prosecution thereof, and devoted thirty-three years of the best portion of her life to obtain what of right and equity to her belongs. That she expended the fortune of her first husband, Wm. Wallace Whitney, about forty thousand dollars, in that pursuit, and when she intermarried with Major Gen. Edmund Pendleton Gaines, in the year 1839, he devoted nearly his whole fortune, about one hundred thousand dollars, to assist your oratrix in maintaining her rights to the aforesaid lands and other property of her father, in addition to the sum of nearly five hundred thousand dollars for which your oratrix has become liable in her ceaseless efforts to accomplish the same end; all which were, and of necessity must be, well known to these defendants.

And your oratrix expressly charges, that the lands aforesaid yields a large annual rent and revenue, which is received by said defendants and appropriated to their own use; that said defendants so mismanage said estate, so neglect to pay taxes legally assessed thereon, and are irresponsible and insolvent to such a degree that there is great danger that your oratrix will be forever deprived of the aforesaid rents and revenues, unless this honorable court shall appoint a receiver to receive said rents and revenues, and manage them under its direction; and your oratrix prays that such receiver be appointed.

And your oratrix alleges that all the above described lands are of the value of five hundred thousand dollars, and that each particular tract actually claimed and possessed by each defendant is over the value of one thousand dollars.

To the end thereof, that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and may, upon their corporal oaths, according to the best and utmost of their knowledge, information, remembrance, and belief, full, true, direct, and perfect answer make to the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are required to answer; and that they answer all and singular the matters and charges aforesaid as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated, that is to say:

Interrogatory 1st. Whether the property mentioned and described in the foregoing bill of complaint was not a part and portion of the estate of the said Daniel Clark, deceased, of which he died seized and left at his death?

13 Interrogatory 2d. Whether the said defendants, or either of them, claim to be the owners of, or otherwise interested in, any portion of said property. If yea, to what portion, and by what right, do they claim the ownership of, or any interest in, said property, respectively? Each is required to set forth at length, with metes and bounds, his right, title, and interest to the particular portion of said property claimed by him, with the legal evidence of the title annexed.

Interrogatory 3d. Whether said property, or any part thereof, yields a revenue, and what portion, and what is the amount of such revenue annually; whether derived from rents, or how otherwise, how long have the said defendants respectively held possession of, or derived a revenue from, that portion of said property held by each one of them respectively, and what has the annual value of said rents and revenues amounted to, one year with another, since the date of the possession of said property held by them respectively?

Interrogatory 4th. Whether the defendants, or either of them, have sold or otherwise disposed of any of the property herein above described since the same was held or claimed by the said defendants, or any of them? If yea, what portion, and when, and how, and for what consideration the same was disposed of?

And that defendants may be decreed to hold said property as trustees for your oratrix, and to make full discovery of the matters and things herein set forth, and that they may be decreed to deliver up to your oratrix the property hereinbefore named and described, together with the rents and revenues thereof; and that an account be taken of the said rents and revenues from the time the said property was taken possession of by said defendants, with interest thereon, and that said defendants be decreed to pay the same to your oratrix, and that your

oratrix may have such further relief, or may have such other relief, as the nature of the case shall require and as shall be agreeable to equity.

May it please your honors to grant unto your oratrix the writ of subpœna issuing out of, and under the seal of, this honorable court, to be directed to the said defendants, to wit:

(Process is prayed against all the defendants to the bill, and their names are omitted for brevity.)

Commanding them, by and under certain penalty, to be inserted, to be and appear before this honorable court, and then and there to answer the premises, and further to stand and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your oratrix will ever pray, etc.

H. D. STONE,
Solicitor of Complainant.

NOTE.—Each defendant is required to answer each of the above interrogatories, numbered 1st, 2d, 3d, and 4th.

H. D. STONE,
Complainant's Solicitor.

14 *Subpœna.*

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the eastern district of Louisiana, greeting:

You are hereby commanded to summon Eliza Davis Kenner, admintratrix of of the estate of Minor Kenner, and tutrix of Daniel Kenner, Maria Kenner, Oxley Kenner, her minor children, a citizen of the State of Louisiana, to appear before the honorable the judges of the sixth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday in February, 1866, then and there to answer a bill in chancery, filed against her et als., wherein Myra Clark Gaines, a citizen of the State of New York, complainant, and said Eliza Davis Kenner, administratrix, et als., are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 22nd day of November, in the year of our Lord one thousand eight hundred and sixty-five, and the ninetieth year of American Independence.

[L. S.] F. B. VINOT, JR.,
Deputy Clerk.

The defendant is hereby notified that she is required to enter her appearance in the clerk's office of the United States circuit court, on or before the first Monday in February, 1866, otherwise the bill may be taken pro confesso.

B. F. VINOT, JR.,
Deputy Clerk.

Return of service of above subpœna.

Received, December 8th, 1865, and on the 3rd day of January, 1866, served a copy of the within subpœna on Mrs. E. D. Kenner, administratrix of the estate, etc., and tutrix of the minors named herein, per-

sonally at her domicil, corner of St. Charles and St. Mary streets, in this city.

T. REDDINGTON,
Sp'l D'y U. S. Marshal.

NEW ORLEANS, *January 5th*, 1866.

Entry in the order book.—February rules, 1866.

MYRA CLARK GAINES
versus } No. 3663.
P. H. MONSSEAUX ET ALS.

This day came into the clerk's office Eliza Davis Kenner, ad-
15 ministratrix, etc., and Minor Kenner, by their counsel, Miles Taylor, esq., and entered her appearance to complainant's bill.

Pleas and answer of Eliza Davis, widow of Minor Kenner.—Filed March 5th, 1866.

U. S. circuit court, eastern district of Louisiana. In chancery.

MYRA CLARK GAINES
versus } No. 3663.
P. H. MONSSEAUX ET ALS.

To the honorable the circuit court of the United States, sixth circuit, eastern district of Louisiana:

The pleas and answer of Eliza Davis, widow of Minor Kenner, deceased, tutrix of Daniel Kenner, Maria Kenner, and Oxley Kenner, the minor children of the said Minor Kenner, and acting as the administratrix of the estate of the said Minor Kenner, to the bill of complaint of Myra Clark Gaines, complainant in the above-entitled cause.

The defendant by protestation, not confessing or acknowledging all or any of the matters and things in complainant's bill mentioned, to be true, in such manner and form as is therein and thereby set forth and alleged, doth plead thereunto, and for plea saith, that by the last will and testament of Daniel Clark, dated the 20th day of May, 1811, and referred to in the complainant's bill, his executors were authorized and empowered to dispose of and settle his whole estate; that the probate court of the parish of Orleans, in which said estate was opened, made an order on the 27th of August, 1813, on the petition of Richard Relf, one of said executors, and the only one then in the State of Louisiana, directing the sale of the movable and immovable property of said Daniel Clark; that under the said order, the plantation mentioned in the bill of the complainant, situated in the parish of Jefferson, was sold in the manner prescribed by the laws of Louisiana at public auction, by the register of wills of the parish of Orleans, on the 8th day of November, 1813, and adjudicated to Michel Fortier and Omer Fortier, for the sum of $120,000.00, of which $80,000.00 were payable in six annual installments of $13,333.33⅓ cents each, falling due on the 1st of March, 1814–15–16–17–18–19, and $40,000.00 were payable on the 1st of May, 1822, with six per cent. interest, payable annually; that the said sale was necessary, judicious, and advantageous, inasmuch as the said Daniel Clark had bought the said plantation with the slaves thereunto attached, from Stephen Henderson, by an act passed before John Lynd, notary public, on the 16th day of December, 1812, for the same sum of $120,000.00, payable $80,000.00

to the said Stephen Henderson, in four annual installments of $20,000.00 each, falling due on the 1st of January, in 1814-15-16 and 17, and
16 $40,000.00 payable to Israel E. Trask, on the 2nd day of May, 1822, with six per cent. interest, payable annually, and had paid no part of said price, which was secured by mortgage, and the payment whereof might have been enforced by executory process, and inasmuch as the estate of the said Daniel Clark was deeply involved, and but for the indulgence shown by the creditors thereof on account of the confidence which they had in the said Chew and Relf, would have proved largely insolvent, as will more fully appear from the notarial acts of sale of said plantation to said Michel and Omer Fortier, consequent on the aforesaid adjudication, and executed before Marc Laffitte, notary public, on the 13th of November, 1813, by which it is further shown that the said purchasers gave three wealthy and substantial securities for the payment of said price, viz, Dransin Labranche, Lucien Labranche, and Norbert Fortier; that by an act passed before Marc Laffitte, notary public, on the 9th of January, 1818, the said Omer Fortier and Jacques Fortier, the latter being the sole heir of the aforesaid Michel Fortier, who then had departed this life, sold the aforesaid plantation to G. Croghan and Joseph Saul, together with eighteen of the slaves which the said Michel and Omer Fortier had bought from the estate of Daniel Clark, to wit, Adam, James, David, Hector, Linda, Providence, Anthony, Stephen, Stewart, Figaro, Inda, Hannah, Kate, Julia, Eliza, Jim, John, and Coicon, the said slaves being not otherwise described in said act of sale, and also with some other slaves which never were the property of the estate of Daniel Clark; that said sales were made for the sum of $120,000.00, of which $80,000.00 was payable in annual installments of $13,333.33⅓ cents each, payable on the 1st of March, 1819-20-21-22-23-24, $13,333.33⅓ cash, and $26,666.66⅔ in two equal terms, falling due in March, 1825, and March, 1826, and bearing interest at the rate of six per cent. payable annually; that from said act it also appears that the said Michel, Jacques, and Omer Fortier had paid up to that time $40,000.00 to the estate of the said Daniel Clark on account of this aforesaid purchase; that the said estate of Daniel Clark had then also only paid the sum of $40,000.00 to Stephen Henderson on account of the aforesaid purchase made of him by the said Daniel Clark, and that the said Jacques Fortier and Omer Fortier bound themselves faithfully to apply the amounts thereafter to be paid to them by the said Croghan and Saul, to the extinction of the price due to the estate of Daniel Clark.

That by an act passed before the said Carlile Pollock, notary public, on the 7th of May, 1818, the said Joseph Saul entered into an agreement with Denis A. Smith, to sell to him the aforesaid plantation for the sum of $140,000.00, payable $10,000.00 in the draft of the said Denis A. Smith on James William McColloh, at 90 days' sight, and the remainder in the eight notes of the said Smith, secured by mortgage on said property, of $16,250.00 on each, payable on the 1st of March, 1819-20-21-22-23-24-25 and 26, the first two of said notes being guaranteed by James William McColloh and Smith and Buchanan of Baltimore, and all said notes being deliverable within six months.

That by an agreement entered into and acknowledged before the mayor of the city of Baltimore, on the 2nd of October, 1818, the
17 said Denis A. Smith transferred to Daniel C. Holliday all his rights under his above mentioned agreement with Joseph Saul; that by an act passed before the said Carlile Pollock, notary public, on the 18th day of November, 1818, the said Joseph Saul sold the said plantation and slaves to said Daniel C. Holliday, on the terms stipulated

in the said Saul's aforesaid agreement with Denis A. Smith, dated the 7th of May, 1818; that in said act the said Saul acknowledged that the aforesaid draft of $10,000.00 had been paid, and that the note of said Denis A. Smith, drawn and secured according to the aforesaid agreement of May 7th, 1818, and bearing mortgage on said property, had been delivered to him, and the said Daniel C. Holliday bound himself to pay all said notes; that in said act it is further declared that the said plantation was still mortgaged to secure the payment of five installments of $13,333.33⅓ each, falling due on the 1st of March, 1819-20-24-25 and 26, and also the interest at the rate of six per cent. on the sum of $26,666.66⅔, less the sum of $6,000.00 which had already been paid thereon; and the said Saul bound himself to make all the said payments.

That the said Daniel C. Holliday died on the day of February, 1819, leaving numerous heirs, of whom John R. Holliday was one to the extent of one-sixth of the estate of said Daniel C. Holliday; that by an act passed before said Carlile Pollock, notary public, on the 18th day of July, 1820, most of said heirs sold their interest in said plantation to said John R. Holliday, on consideration that he should account for and pay all moneys and expenses disbursed and incurred by the said Daniel C. Holliday, on account of said plantation, and likewise pay all claims and demands against the same, and receive all benefits and advantages that had arisen out of it since the said Daniel C. Holliday purchased, so as to account (in his capacity of executor or administrator of the estate of Daniel C. Holliday) for all the property the said Daniel C. Holliday would have possessed at the time of his death, had he never purchased said plantation.

That the said John R. Holliday, being thus the owner of five undivided sixths of said plantation, instituted, on the 7th day of March, 1825, a suit in the first judicial district court of the State of Louisiana, in which he set forth that the minor children of the late Mary Lee, represented by William Lee, their father and guardian, were the owners of the other undivided sixth; that the late Daniel C. Holliday had entered into a contract, on the 2nd of October, 1818, with Sam'l Smith, A. Buchanan, and James W. McCulloh, of Baltimore, stipulating that he should convey to them an undivided half interest of said plantation on certain conditions; that on the 4th of July, 1819, the said John R. Holliday had entered into another agreement with said James W. McCulloh, in which it was stated that said Sam'l Smith and said A. Buchanan had assigned their interest under the aforesaid agreement of Ocober 2nd, 1818, to said James W. McCulloh, the other parts of said agreement relating to the management of said plantation; that since then, the said McCulloh had assigned his interest to George Winchester and H. Y. Payson, and that all the said parties who were never jointly inter-
18 ested with him in said plantation having refused to contribute to the expenses thereof, he prayed for a settlement of said partnership, and for a judicial sale of said plantation, to effect a partition and liquidation of the joint owners.

That the suit turned only upon matters of account, which it is unnecessary to mention here; that on the 6th of July, 1825, a judgment was rendered therein, ordering the sale of said plantation, and that thereupon, the said plantation was sold at sheriff's sale, and adjudicated to the said John R. Holliday for $105,000.00.

That the said John R. Holliday paid the whole price of the plantation, principally by loans which he obtained from the commercial firm of Wm. Kenner & Co., and from the Bank of Louisiana, for which he

granted two mortgages executed on the 3rd of November, 1825, and the 13th of June, 1826, before H. K. Gourdain, notary public.

That the said John R. Holliday having shortly thereafter died, his estate was opened in the probate court of the Parish of Jefferson; that a sale of said plantation having been demanded by the said mortgage creditors, and ordered by said probate court, the said sale took place on the 28th October, 1826, when the same was adjudicated to Maria Jones, the widow of said John R. Holliday, for $125,700.00, payable $45,000 in ninety days, $60,000.00 in the assumption of the aforesaid mortgage debt due to the said Bank of Louisiana, $61,194.39 in assumption of the aforesaid mortgage debt due to the insolvent estate of Wm. Kenner & Co., and cash.

That the said debt of $60.000.00 due to the Bank of Louisiana was payable in one, two, three, four, or five years, from the 13th of November, 1826, with nine per cent. interest per annum annually; that the said debt of $61,194.39 due the estate of Wm. Kenner et al. was payable in four, five, and six years from the 13th of June, 1826; that the estate of said John R. Holliday being insolvent, and the said Maria Holliday not having been able to receive from the same any part of the amount she brought into the marriage, the said creditors would not have been paid their aforesaid claims, if they had not granted the above mentioned extension of time; that the said Maria Holliday gradually paid off the said mortgage in favor of the Bank of Louisiana, which was first in rank, and also about $13,000.00 on account of the mortgage due to the estate of Wm. Kenner & Co.; that on the 12th day of June, 1835, Richard Relf, then the sole syndic of the creditors of Wm. Kenner & Co., instituted suit against the said Maria Holliday, in the first judicial district court of the State of Louisiana, to recover $64,306.51, this being the balance then due in principal and interest on the last-mentioned debt; that during the pendency of said suit, the two children of the said Maria Holliday by her first marriage, with William Davis, to wit, Maria Davis, the wife of Wm. R. Taylor, and Eliza Davis, this defendant and the wife of Minor Kenner, instituted suit against the said Maria Holliday, in the probate court of the parish of Jefferson, to secure the amounts in which the said Maria Holliday, as their former tutrix, was indebted to them, and on the 19th of March, 1836, obtained judgment against her, to wit, the said Maria Taylor, for
19 $18,911.00, and the said Eliza Kenner, for $26,935.15; that an execution having issued under said judgment, the aforesaid plantation was seized, and was sold with the consent of the aforesaid Relf, syndic of the creditors of Wm. Kenner & Co., by the sheriff of the parish of Jefferson, on the 25th of February, 1837, in lots having about one arpent front by the depth to Lake Pontchartrain, on long terms of credit; that the value of real estate having at that time reached an extraordinary height, the said plantation brought the sum of $151,000.00, in notes, which were deposited by consent of parties in the Citizens' Bank of Louisiana, subject to the decision of the aforesaid suit instituted by the syndic of the creditors of Wm. Kenner & Co.; that thereafter the said Eliza Davis, this defendant, and Maria Taylor, intervened in said suit, and claimed to be paid in preference out of the proceeds of the said sale deposited in the Citizens' Bank of Louisiana, on the ground that they had a tacit mortgage upon the property of said John R. Holliday and Maria Holliday, their former tutors, for the restitution of amounts which they had inherited from their late father, and which had been received by the said John R. Holliday and Maria Holliday, and that said tacit mortgage was prior in rank to that of the said syndic; that in said suit

the said Maria Holliday contended that she could not be compelled to pay the claim of the syndic, on account of the pendency of a suit instituted against her and others by the complainant, Myra Clark Gaines, and that in said suit judgment was rendered in 1841, by the supreme court of the State of Louisiana, condemning the said Maria Holliday to pay to the said syndic the sum of $64,306.51, with a considerable back interest, declaring that notwithstanding the suit instituted against her by the said Myra Clark Gaines, she was bound to pay said sum, but ordering that the said Maria Taylor and Eliza Kenner should be paid in preference to said syndic out of the funds deposited in the Citizens' Bank of Louisiana, as aforesaid; that thereupon a settlement took place between all the aforesaid parties by an act passed before Joseph Cuvillier, notary public, on the 2nd of February, 1842, from which it appears that the debt due by said Maria Holliday to said syndic amounted, on the 21st January, 1841, in principal and interest, to the sum of $86,446.50; that she paid at the time of said settlement to said Maria Taylor $13,336.00, to the said Eliza Kenner the sum of $14,000.00, and to the said Richard Relf, syndic, the sum of $43,129.83, which left her still indebted to him in the sum of $43,316.00 that for this balance she executed twenty-four promissory notes to the order of this defendant, payable on an average in one, two, three, and four years, with ten per cent. interest from date, and that to secure said notes she mortgaged to the said syndic 10 arpents front, with the whole depth, being a part of the aforesaid plantation, five of said arpents front having originally been reserved from said sheriff's sale of February 25th, 1837, and the other five arpents having been taken by said Maria Holliday from persons who bought the same at the aforesaid sheriff's sale of February 25th, 1837, designated as lots Nos. 4, 5, 6, 9, and 10.

That the said Maria Holliday having died some time in the year
20 1843 intestate, and her estate having been opened in the probate court of the parish of Jefferson, the aforesaid ten lots of ground and the other property of her estate were sold on the 10th of February, 1844, by the parish judge of the parish of Jefferson, in obedience to an order of the court of probates of said parish, and adjudicated to Alexander Zenon Trudeau, and that thereafter the said Minor Kenner, deceased, husband of defendant, purchased the said ten arpents from the said Trudeau, and that by various purchases made before and after the death of the said Mrs. Holliday her said husband, Minor Kenner, became the owner of the whole of the aforesaid plantation, and that the same, with the exception of certain small parcels of ground, now belongs to, and is embraced in the succession of the said Minor Kenner. And this defendant avers that to the best of her knowledge, information, and belief the whole of the said price of the said plantation was actually paid in good faith, by the said Michel and Omer Fortier, Joseph Saul, George Croghan, Daniel C. Holliday and John R. Holliday, the respective and successive purchasers of the same, at the time of the execution of the said acts of sale and conveyances, and at or about the times when the installments respectively fell due, as hereinbefore set forth, and that the said price so respectively paid by them was a full and adequate consideration for the said property; that the said acts of sale and conveyances were sales and conveyances in due form of law; that the said respective sellers were, at the time of the execution of the said acts of sale and conveyances respectively, in possession of the said plantation, and were respectively seized thereof in fee simple; that the said respective purchasers believed their respective vendors were seized of the same in fee simple at the time they severally accepted the said

sales and conveyances to them, and at the time they respectively paid the purchase money as aforesaid, and that the said Michel and Omer Fortier, Joseph Saul, George Croghan, Daniel C. Holliday and John R. Holliday, at the time of their respective purchases, or at the time they respectively paid the purchase money therefor as aforesaid, had no notice, to the best of her knowledge, information, and belief, of any right, title, or claim in the complainant, in or to the said plantation, or of the making and existence of the last will of said Daniel Clark, of 1813, and that they were accordingly purchasing for a valuable consideration without notice.

And defendant further avers that the said Maria Holliday had also made payment of a considerable part of the price of her aforesaid purchase before she had any notice of complainant's claim, and was compelled by the aforesaid judgment of the supreme court of Louisiana, although she had resisted the said payment on the ground of the pendency of the claim after she had notice, and that she, the said Maria Holliday, was also a purchaser for a valuable consideration, without notice, and was entitled to the protection of this court.

And defendant further avers and says that the said Minor Kenner, having derived his said title to the said plantation from the said Michel and Omer Fortier, Joseph Saul, George Croghan, Daniel C. Holliday and John R. Holliday, who were purchasers in good faith for a
21 valuable consideration, without notice, and from the said Maria Holliday he was also a purchaser without notice, he also was entitled to the protection of this court; and that she, as the administratrix of the said succession, is now also entitled the protection of this court.

And the defendant, for further plea to the said bill, says and avers that the said plantation was sold in due course of administration of the succession or estate of the said Daniel Clark on the 8th of November, 1813, by the register of wills of the parish of Orleans, in obedience to a decree of the competent court, to wit, the court of probates of the parish of Orleans, dated on the 27th day of August, 1813, which decree was regularly obtained according to law; that the said plantation was adjudicated to the said Michel and Omer Fortier under and by authority of the said decree; that the said decree of the said court of probates under which the said sale was made cannot be impeached, and that the said sale and adjudication of the said plantation to the said Michel and Omer Fortier, under the authority of the said decree, transferred all the right, title, and interest of the said Daniel Clark in and to the said plantation to the said Michel and Omer Fortier, and vested the title thereto in them.

Wherefore defendant pleads the purchase for a valuable consideration, without notice, of the said Michel and Omer Fortier, Joseph Saul, George Croghan, Daniel C. Holliday, John R. Holliday, and Maria Holliday, and the said sale and adjudication under the authority of the said decree of the probate court of the parish of Orleans, dated August 27th, 1813, in *in* bar to complainant's bill, and pray' the judgment of this honorable court whether she shall be compelled to make any further and other answer thereto, and prays to be hence dismissed with her costs.

And the defendant, not waiving her said pleas, but wholly relying and insisting thereon, for answer to so much of the said bill as defendant is advised is material or necessary to make answer unto, in aid of her said plea of purchaser for a valuable consideration without notice, and for no other purpose, defendant says that, to the best of her knowledge, information, and belief, she denies that the said Michel and Omer

Fortier, Joseph Saul, George Croghan, Daniel C. Holliday, and John R. Holliday, at the times they respectively purchased the said plantation, and accepted the said conveyances of the same, and at the time they paid the purchase-money of the same, had any notice of any right, title, interest, or claim in the complainant in or to the same, or that the said plantation had been at any time disposed of in any way or manner which was illegal, informal, fraudulent, or void by the laws of Louisiana, or of the making and existence of the said will of Daniel Clark of 1813, and that in like manner the said Maria Holliday had no notice of complainant's claim until she had actually paid the great part of the said price, and that she only paid the remainder of the same, after notice, on being compelled so to do by the said judgment of the supreme court of the State of Louisiana, as aforesaid.

And defendant, further answering, says that she has been informed, and believes it to be true that said decree of the court of pro-
22 bates of the parish of Orleans was regularly and legally obtained, and that the said sale and adjudication made under the same was made according to law; that the said purchase-money of the said plantation was actually and bona fide paid by the said Michel and Omer Fortier, Joseph Saul, Daniel C. Holliday, John R. Holliday, and Maria Holliday at the times of the execution of the said acts of sale and at the time the said installments respectively fell due, as hereinbefore set forth.

Wherefore your defendant humbly prays to be hence dismissed with her costs.

MILES TAYLOR,
Solicitor.

I, Miles Taylor, of counsel for the said Eliza Davis, widow of Minor Kenner, deceased, tutrix and acting as the administratrix of the estate of said Minor Kenner, the before named defendant, hereby certify that the foregoing pleas are, in my opinion, well founded in point of law.

MILES TAYLOR.

Eliza Davis, widow of Minor Kenner, deceased, and tutrix and acting as the administratrix of the estate of the said Minor Kenner, being duly sworn, says the foregoing pleas are not interposed for delay; and she further says that the facts set forth in the foregoing pleas and in the answer in support of the said pleas are true to the best of her knowledge, information, and belief.

ELIZA KENNER.

Sworn to and subscribed before me this 5th March, 1866.

F. B. VINOT, Jr.,
Deputy Clerk.

Answer of Eliza Davis, widow of Minor Kenner.—Filed April 20th, 1872.

U. S. circuit court, eastern district of Louisiana. In chancery.

MYRA CLARK GAINES *versus* P. H. MONSSEAUX ET ALS.	No. 3663.

The answer of Eliza Davis, widow of Minor Kenner, deceased, tutrix of the minor children of the said Minor Kenner, and acting as the administratrix of the said Minor Kenner to the bill of complaint of Myra Clark Gaines, complainant in the above-entitled cause.

The said defendant, not waiving her pleas heretofore filed, but relying on the same, and at all times hereafter saving and reserving to herself all benefit and advantage of exception which can or may be had to the many uncertainties and other imperfections in the said complainant's bill of complaint contained, for answer to so much and such
23 parts thereof as defendant is advised is or are material or necessary to be answered unto, the defendant answering to the best of her knowledge, information, and belief, says:

That the last will and testament of Daniel Clark, dated the 20th day of May, 1811, was admitted to probate by the court of probates in the parish of New Orleans, on the 17th day of August, 1813; that in the said will the said Daniel Clark ordered that all his just debts should be paid, and declared that he left and bequeathed to his mother, Mary Clark, then of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which he might die possessed of, and that he nominated and appointed his friends, Richard Relf and Beverly Chew, his executors, with power to settle everything relative to his estate; that on the said 17th day of August, 1813, the said probate court of the parish of New Orleans, after declaring that the last will and testament had been duly proved according to the laws of the State, ordered the said will to be deposited and recorded according to law; that upon application of Richard Relf, one of the persons named and nominated and appointed executors in the said will of Daniel Clark, it was ordered, on the 27th of August, 1813, that letters testamentary should issue and be delivered to the said Richard Relf according to law, and that such letters testamentary were on that day issued him; that on the said 27th day of August, 1813, on the application of the said Richard Relf, testamentary executor as aforesaid, an order was made by the said probate court directing the sale of the movable and immovable property of the said Daniel Clark, deceased, to be made as prayed for according to law; that an inventory, made under the authority of the said court of probates by Thomas Beale, register of wills of the city and parish of New Orleans, was begun on the 28th day of September, 1813, in which the plantation mentioned in the bill of complainant, situated in the parish of Jefferson, on the left bank of the Mississippi River, about fifteen miles above the city of New Orleans, and having a front of twenty-four arpents and a half on the said river, was embraced as making a part of the property belonging to the said Daniel Clark at the time of his death, and that under the authority of the said order for the sale of the movable and immovable property of the said Daniel Clark, made on the said 27th day of August, 1813, as aforesaid, the said plantation was sold in the manner prescribed by the laws of Louisiana, at public auction, by Thomas Beale, the register of wills of the parish and city of New Orleans, on the 8th day of November, 1813, and adjudicated to Michel Fortier and Omer Fortier, all of which will more fully appear by reference to the record of the proceedings in the matter of the succession of the said Daniel Clark begun and carried on for a long period of time in the probate court of the city and parish of New Orleans, and now deposited in and making a part of the records of the second district of the parish of Orleans, which is the successor of the said probate court, and to the notarial act of sale executed in consequence of the said adjudication, and passed on the 11th of November, 1813, before Marc Lafitte, a no-
24 tary public in the said city and parish of New Orleans, copies of which said order for the sale of the movable and immovable property of the said Daniel Clark, deceased, made by the said court of probates on the said 27th day of August, 1813, as aforesaid, and of the

sale of the said plantation at public auction, made under the authority of the said order, by the register of wills of the parish and city of New Orleans on the 8th day of November, 1813, as aforesaid, and of the said notarial act of sale to the said Michel and Omer Fortier, passed before the said Marc Lafitte, notary, as aforesaid, are herewith filed as exhibits, and are marked A, B, and C.

And defendant, further answering, says that by a notarial act passed before Marc Lafitte, a notary public, as aforesaid, on the 9th of January, 1818, the said Omer Fortier and Jacques Fortier (the said Jacques Fortier being the sole heir of the said Michel Fortier, who had departed this life), sold the said plantation and other property to G. Croghan and Joseph Saul, a copy of which said notarial act is herewith filed and marked as Exhibit D; and that afterwards, by various mesne conveyance, the said plantation, by successive purchases and sales made in due form and course of law, was transferred to and came into the possession as owner of Minor Kenner, deceased, the late husband of defendant, and that the same (with the exception of certain parcels of ground making a part of the said plantation which had been disposed of by him and transferred to others before his death) belonged to and was embraced in the succession of the said Minor Kenner at the time of the exhibition of the bill of complaint filed in this case.

And defendant, further answering, now avers that she is informed and verily believes the truth so to be, that the plantation was sold in due course of administration and according to and in conformity with the laws of Louisiana in such cases made and provided, as property belonging to the succession or estate of the said Daniel Clark, on the said 8th day of November, 1813, by the register of wills of the city and parish of New Orleans, in obedience to and under the authority of a decree of the competent court, to wit, the court of probates of the city and parish of New Orleans, dated on the 27th day of August, 1813; that the said plantation was duly adjudicated to the said Michel and Omer Fortier under and by authority of the said decree; that the said decree of the said court of probates under which the said sale was made was obtained according to law in the ordinary course of the administration of the said succession or estate and cannot be impeached, and that the said adjudication and sale of the said plantation, as aforesaid, to the said Michel and Omer Fortier under the authority of the said decree transferred all the right, title, and interest of which the said Daniel Clark died possessed in and to the said plantation to the said Michel and Omer Fortier, and had the effect of vesting the same in them, and that defendant now pleads the said title so vested in her capacity of representative of the succession or estate of the said Minor Kenner, deceased, the successor of the said Michel and Omer Fortier by a particular title, in bar to the claim set up by complainant against defendant in her bill of complaint.

25 And defendant, further answering, expressly denies that she has now or ever had any knowledge, information, or belief that the sale of the said plantation made as aforesaid, on the said 8th day of November, 1813, under the authority of the said order of the said court of probates, dated on the 27th day of August, 1813, was illegal, informal, fraudulent or void, or that the acts of the said Richard Relf, as testamentary executor of the said Daniel Clark, with respect to the proceedings for the sale of the said plantation, was illegal, informal, fraudulent and void, as charged in said bill of complaint, or in any other way or manner whatsoever; and she now avers that she is informed and verily believes that the said Michel and Omer Fortier, at the time of the adjudication and

sale of the said plantation to them, as aforesaid, in November, 1813, had no knowledge, information or belief that the sale of the said plantation made as aforesaid, on the said 8th day of November, 1813, was illegal, informal, fraudulent or void, or that the acts of the said Richard Relf, as testamentary executor of the said Daniel Clark, with respect to the proceedings for the sale of the said plantation were illegal, informal, fraudulent or void, as charged in said bill of complaint, or in any other way or manner.

And defendant further answering says, that she is informed and believes that at the time the said Michel and Omer Fortier acquired the said plantation by purchase at the said sale made at public auction on the said 8th day of November, 1813, under the authority of the order of the said court of probates, dated on the said 27th of August, 1813, the said Michel and Omer Fortier believed that the proceedings by which the said sale and adjudication were effected were regular, legal and according to law; that the said adjudication at the said public auction and the act of sale made in pursuance thereof were legal in point of form and sufficient to transfer to them the said plantation, and they had just reason to believe themselves to be the owners of the said plantation from the time of the said adjudication and the passage of the said act of sale in pursuance of the said adjudication; that the said Michel and Omer Fortier entered into possession of the said plantation on the said 8th day of November, 1813; and that the said Michel Fortier (and after his death the said Jacques Fortier, the sole heir), and the said Omer Fortier, held the same in fact and right, as owners under and in virtue of the said adjudication on the said 8th of November, 1813, and the said act of sale in pursuance of said adjudication, and from the said 8th day of November, 1813, had the continuous and uninterrupted, peaceable, public and unequivocal possession of the same, until they, the said Omer Fortier, and the said Jacques Fortier (as the legal and sole heir of the said Michel Fortier), sold the said plantation to the said G. Croghan and Joseph Saul, on the said 9th day of January, 1818, by act passed before Marc Lafitte, notary public, as aforesaid.

And defendant further answering says, that she is informed and believes that at the time the said G. Croghan and Joseph Saul acquired the said plantation by purchase from the said Omer and Jacques Fortier, by the said notarial act, passed as aforesaid on the said 9th
26 day of January, 1818, before Marc Lafitte, a notary public, the said G. Croghan and Joseph Saul believed the said Omer and Jacques Fortier to be the true and lawful owners of the same—that the said notarial act of sale from the said Omer and Jacques Fortier passed on the 9th of January, 1818, was an act of sale legal in point of form and sufficient to transfer to them, the said G. Croghan and Joseph Saul, the said plantation; that the said G. Groghan and Joseph Saul were ignorant of any defect in the title of the said Omer and Jacques Fortier to the said plantation at the time of the passage of the said act of sale to them, by the said Omer and Jacques Fortier. That the said G. Croghan and Joseph Saul had just reason to believe themselves to be the owners of the said plantation, and did so believe themselves to be the owners of the same from the time of the passage of the said act of sale by the said Omer and Jacques Fortier to them on the said 9th of January, 1818; that the said G. Croghan and Joseph Saul entered into possession of the said plantation on the 9th day of January, 1818, and held the same in fact and right as owners, under and in virtue of the said act of sale passed on the said 9th of January, 1818, as aforesaid, and from the said 9th day of January, 1818, had the continuous and uninterrupted peace

able, public, and unequivocal possession of the same, until the sale by them of their right, title, and interest to other persons by just titles or acts of sale made in due form and course of law, who respectively entered into and held possession of the said plantation as aforesaid, and through whom, by various mesne conveyances, and by successive purchases and sales made in due form and course of law, the said plantation was transferred to and came into the possession as owner of Minor Kenner, deceased, the late husband of defendant; and that the same was held and possessed by the said Minor Kenner thereafter, (with the exception of certain parcels of ground making a part of the said plantation which had been disposed of by him, and transferred to others before his death,) up to the time of his death, and was afterwards held and possessed by defendant as the administrator of the succession or estate of the said Minor Kenner at the time of the service of process on her in her said capacity in this cause.

And defendant further answering says, that the said purchasers of the said plantation from the said G. Croghan and Joseph Saul respectively, and those through whom the said plantation was transferred to and came into the possession of the said Minor Kenner, and the said Minor Kenner and defendant as administratrix of his succession, respectively entered into possession of the said plantation, and held the same in fact and right as owners, under the said mesne conveyances, and had the continuous and uninterrupted, peaceable, public and unequivocal possession of the same from the time of the sale of the said plantation by the said G. Croghan and Joseph Saul to their vendors, and up to the time of the exhibition of the bill of complaint against defendant in this case, and service of process therein on her on the 3d day of January, 1866.

And defendant further answering says, that she is informed and believes that the said Michel and Omer Fortier at the time they purchased
the said plantation as aforesaid on the said 8th day of November,
27 1813, and the said G. Croghan and Joseph Saul, at the time they
purchased the said plantation as aforesaid, on the said 9th day of January, 1818, had no knowledge, information, or belief of the making and existence of a last will of the said Daniel Clark, executed in the said year 1813, as set up in complainant's bill.

And defendant further answering says, that in the premises the said Michel and Omer Fortier were possessors of the said plantation in good faith from the said 8th day of November, 1813, and up to the said 9th day of January, 1818, and under a just title, when the ownership and possession of the said plantation was transferred to the said G. Croghan and Joseph Saul, by the sale made to them as aforesaid by the said Omer Fortier and the said Jacques Fortier, the legal and sole heir of the said Michel Fortier; and that the said G. Croghan and Joseph Saul were also possessors of the said plantation in good faith from the said 9th day of January, 1818, and under a just title, until the ownership and possession of the said plantation was transferred by them to others, through whom by various mesne conveyances it was transferred to and came into the possession as owner of the said Minor Kenner, as aforesaid; and that the said Michel and Omer Fortier, and the said G. Croghan and Joseph Saul, and all those deriving their title and possession through them, were in like manner possessors in good faith under just titles; and that as such they each and every one had the right under the laws of Louisiana to acquire the title to the said plantation by prescripti n; that prescription began to run in favor of all those deriving their tile and possession to the said plantation from the said G. Croghan and

Joseph Saul, and through them from the said Michel and Omer Fortier, from the said 9th day of January, 1818, the date of the purchase of the said plantation by the said G. Croghan and Joseph Saul, and from the said 8th day of November, 1813, the date of the purchase of the said plantation by the said Michel and Omer Fortier as aforesaid.

And defendant further answering says, she denies that complainant came of age on or about the 31st day of December, 1827, and now avers that she is informed and believes that complainant attained the age of twenty-one years on or about the 4th day of June, 1825.

And defendant further answering says, she is informed that a bill was exhibited in this honorable court by complainant, on or about the 1st day of May, 1857, in suit No. 2734 of the docket of this court, in which various persons were named as defendants, and against whom it was stated therein that the said bill was exhibited; but defendant says she does not know who were named as defendants in said bill, or who were cited to appear and answer said bill, and that she expressly denies that she was cited, or served with process to appear and answer said bill.

And defendant further answering says, that she has no knowledge or information as to whether complainant instituted any suit against the owners and possessors of the said several tracts or parcels of land described in the bill exhibited by her in this case on the 1st day of April, 1861, in the court of the Confederate States, which had usurped
28 the power that of right belong to this honorable court, or that any one was cited to appear and answer thereto on the 1st of May, 1861, or at any other time; and that defendant expressly denies that she was ever cited to appear and answer thereto.

And defendant further answering says, she admits that the said Minor Kenner, deceased, her late husband, was a party to the said suit instituted by complainant in said district court of the United States, for the eastern district of Louisiana, on the 28th of July, 1836, and that he was served with process in the same.

And defendant further answering says, that the institution of the said suit by complainant in the district court of the United States, on the 28th of July, 1836, and the setting up in the said suit of the pretended will of 1813, to enforce her pretended rights under the same, did not interrupt any prescription then running against said complainant; that the said complainant, in her amended and supplemental bill, therein filed on the 28th of November, 1848, renounced, for all the purposes of the said suit against the defendants in the said cause, all claims which said complainant had before made to the estate of the said Daniel Clark, as his universal heir and devisee by the said pretended will of 1813, and declared that she would, as against the said defendants in the said cause, assert and maintain her right, title and equity to the four-fifths of the property named in said amended bill and supplement, as the forced heir of said Daniel Clark, according to the law of the State of Louisiana, in force at the time of the death of the said Daniel Clark; that defendant is informed by counsel, and verily believes, that the said renunciation by complainant of all the claim or demand she had before made to the estate of the said Daniel Clark, as his universal heir and devisee under the said pretended will of 1813, was an abandonment or voluntary discontinuance of her claim or demand before made under the said pretended will of 1813, in said suit; that the said suit so instituted by complainant on the 28th day of July, 1836, as aforesaid, having been terminated both in this honorable court, and in the Supreme Court of the United States, in March, 1852, by final and definitive decree against the right of said complainant to any part or portion of the estate of the

said Daniel Clark, any interruption of any prescription running against complainant, which could or might have been the consequence of said suit so instituted on the 28th day of July, 1836, must, both in law and equity, be considered as never having happened. (See amendment of June 16th, 1877, post, p .)

And defendant further answering says, that the said Michel and Omer Fortier, having been possessors of said plantation in good faith from the said 8th day of November, 1813, under a just title, as aforesaid; and the said G. Croghan and Joseph Saul having been possessors of the said plantation in good faith from the said 9th of January, 1818, under a just title, as aforesaid; the said Michel and Omer Fortier, and the said G. Croghan and Joseph Saul, respectively, had the right, under the laws of Louisiana, to acquire title to the said plantation by the prescription of ten, twenty and thirty years, and those deriving their title and
29 possession from the said G. Croghan and Joseph Saul, and the said Michel and Omer Fortier, had in like manner the right to acquire title to the said plantation under the laws of Louisiana, by the prescription of ten, twenty and thirty years; that the said prescription of ten, twenty and thirty years began to run in favour of the said G. Croghan and Joseph Saul, and the said Michel and Omer Fortier, on the said 9th day of January, 1818, and the said 8th day of November, 1813, and continued to run, without any interruption, in favor of those deriving their title and possession from the said G. Croghan and Joseph Saul, and the said Michel and Omer Fortier, and had become complete in favor of defendant and against complainant, before the service on defendant of any process in this case, so as to put a good and complete title to the said plantation in defendant; and defendant now pleads the said prescription of ten, twenty and thirty years in bar of the claim or demand set up against her in complainant's bill of complaint filed in this cause.

And defendant further answering says, that on or about the 27th day of May, 1869, a suit was instituted in the second district court of the parish of Orleans, being the court of exclusive probate jurisdiction in said parish, entitled Joseph Fuentes et al. vs. Myra Clark Gaines, No. 32979 of the docket of said court; that in the petition filed therein it was averred, in substance, that the probate of said pretended will of 1813, which is set up in this cause by complainant, and made the basis of her claim against defendant and her co-defendants for the recovery of the property described in said bill, was a gross fraud; that the said alleged will never existed; that the evidence and testimony of the witnesses on which the said will was admitted to probate was false or erroneous, illegal, and insufficient; that if any will was made by the said Daniel Clark other than the one admitted to probate and ordered to be executed by a decree of the probate court of the parish of Orleans, dated on the 17th day of August, 1813, (which was expressly denied,) it was destroyed by the said Daniel Clark; that the said Daniel Clark was never married, and had no legitimate child, and that he did not make and could not make a will in favor of the said Myra Clark Gaines, as his daughter, because she was the issue of an adulterous connection, and was without capacity to inherit or receive by last will from the said Daniel Clark; and that it was prayed for therein that the said Myra Clark Gaines should be cited to answer the said petition, and that the probate of said pretended will set forth in complainant's bill should be revoked and recalled, and declared to be absolutely null and void and of no effect.

And defendant further answering says, that the said Myra Clark Gaines was duly cited before the said second district court to answer

the said petition; that afterwards the said Myra Clark Gaines filed her answer in the said suit; that after legal proceedings had in the said suit, the issues made and presented therein were tried in due course of law; that on the 4th day of December, 1871, a judgment was rendered in the said suit by the said second district court, in which it was ordered, adjudged, and decreed, that the said will, purporting to be the
30 will of Daniel Clark, and to be dated July 13th, 1813, as set forth in the petition and suit filed by Myra Clark Gaines on the 18th January, 1855, in the record and matter of the succession of said Daniel Clark, No. 8646 of the second district court of New Orleans, be revoked and declared invalid, and that the probate thereof, as obtained on said petition, be annulled and recalled as absolutely null and of no effect; that the said judgment was signed on the 23d day of December, 1871; that an appeal from the said judgment was granted by the said second district court, on or about the 29th day of December, 1871, and that the said suit is now pending and undetermined in the supreme court of the State of Louisiana.

And defendant further answering says, that the second district court of the parish of Orleans was vested by law with exclusive jurisdiction over the subject matter of the said suit; that the said supreme court of Louisiana is now rightfully seized of the same; that if the said judgment in the said suit No. 32979 shall be affirmed by the supreme court of the State of Louisiana, the said judgment will be final and conclusive upon said complainant, and will have the effect to set aside and to utterly destroy the probate of the said will as set up by said complainant in her bill filed in this cause and to deprive her of all foundation to any right to the property or any portion of the property described in said bill and sought to be recovered from the defendants in the said cause; that defendant avers that in the premises she is entitled, in equity, to have the proceedings against her stayed until the final decision of the said suit No. 32979, of the docket of the second district court, so that she may have an opportunity to set up the said judgment, if the same be affirmed on the appeal, in bar of the said claim of the complainant, as made in the bill of complaint herein; and that defendant now expressly reserves the right to avail herself of the said judgment when it is affirmed and becomes final and conclusive against complainant, to defeat any claim on the part of complainant founded on the said pretended will of the said Daniel Clark of July 13th, 1813, and of the probate thereof, as set forth in complainant's said bill of complaint. (See amendment of June 16th, 1877, post, p. .)

And defendant further answering says, she is informed and believes that she is not bound to make any other or further answer to any matter or thing contained in said complainant's bill of complaint, or to the interrogatories annexed to the same.

Wherefore defendant prays to be hence dismissed with the reasonable costs and charges in this behalf most wrongfully sustained.

MILES TAYLOR,
Solicitor.

Personally appeared before N. W. Trimble, clerk U. S. circuit court, 5th cir. & so. dist. Ala., Eliza Davis, widow of Minor Kenner, deceased, the above-named defendant, being first duly sworn on her corporal oath, doth declare that the facts stated in the foregoing answer, so far as the same are stated and set forth as from her personal knowledge are true, and that so far as the same are stated as derived from others, she believes them to be true.

ELIZA KENNER.

31 Subscribed and sworn to before me this 15th day of April, A. D. 1872.

Witness my hand and the seal of said circuit court this 15th of April, A. D. 1872.

N. W. TRIMBLE,
Clerk, etc.

Exhibit A and B annexed to Mrs. Kenner's answer.—Filed April 20th, 1872.

A.—Petition and order to sell property of succession of Daniel Clark.

Court of probate.

Richard Relf, executor of D. Clark, petition for sale of property, August 27th, 1813.

To the honorable James Pitot, judge of the court of probate, in and for the parish and city of New Orleans.

The petition of Richard Relf, testamentary executor of the late Daniel Clark, humbly showeth:

That your petitioner prays your honor to grant him the necessary authorization that he might sell the movable and immovable property of the estate of the deceased at public auction in the manner and form prescribed by law; that is, after ten days' advertisement, for the movable effects, and after thirty days advertisement for the slaves and other immovable effects, and your petitioner, as in duty bound, will ever pray.

(Signed) RICHARD RELF,
(Signed) MOREAU LISLET,
Of Counsel for the absent Heirs.

Order.—Endorsed on the foregoing petition.

Let the sale take place as prayed for according to law.
New Orleans, August 27th, 1813.
(Signed) J. PITOT, *Judge.*

B.—Proces verbal of sale.

And this day, the eighth of November, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-eight of the Independence of the United States of America, at o'clock in the morning, I, Thomas Beale, register of wills, in and for the parish of New Orleans, went at the coasts of Chapitoulas, on a sugar plantation vulgarly called the Cannes Brulées, belonging to the estate of the late Daniel Clark, for the purpose to sell the said plantation and some slaves belonging to said estate, where being, I found Mr. Richard Relf, testamentary executor of said deceased, Mr. L's Moreau Lislet, attorney appointed by the court to represent the absent heirs, and Messrs. L. Lecesne and L. A.
32 Pignegui, witnesses here present, and then and there, I proclaimed the said sale at the following terms and conditions to wit:

The plantation and forty slaves sold with it payable $40,000 dollars the first May, 1822, with a yearly interest of six per cent., payable on the first May of every year, and the remaining in six equal instalments, payable on the first of March of every year, beginning in 1815, with special mortgage until final payment.

And the other slaves payable at six months' credit in notes, endorsed to the satisfaction of the testamentary executor and special mortgage until final payment.

A plantation situated six leagues above this city, on the left bank of the river, having twenty-four and a half arpents, more or less in front, and extending back as far as the lake, bounded on one side by Mr. William Kenner, and on the other side by Mr. Jacques Fortier, and known by the name of Cannes Brulées, with all the implements of husbandry, animals, cattle, etc., and forty slaves, viz: Adam, Hector, Lubin, William, Ketey, Kate, Sylvia, James, Stephens, Doctor Davy, Antoine, Figaro, Stewart, Dave, Jim, Eliza, Maurice, Rose, Lindor, Providence, John, Julia, Andrew, Moses, Hannah, Kitty, Rosette, and her child, Bob, Macdaniel, Laurence, Franky and her four children, John, Charley, McKinsey, and Margerit; Judah and her three children, John, Quaks, and Jenny, Toby, which struck off and adjudged to Messes. Michel Fortier, jr., and Omer Fortier, for the sum of one hundred and twenty thousand dollars.....	$120,000
A negro man named Luke, aged 30 years or thereabouts to the same for five hundred dollars.....	500
A negro named James, aged years, to the same for the sum of seven hundred dollars.....	700
A negro woman named Rose and her son, Bob, to Messrs. M. Fortier and Omer Fortier for four hundred and fifty dollars.	450
A negro named Jack, to the same, aged about, for.....	600
A negro named Nace, aged about, to the same for.....	600
A negro named Moses, aged about, to the same for.....	500
A negro named Solomon, aged about, to the same for....	450
A woman named Sarah, about years old to the same for..	500
A man named Wellaged, about years, to the same for ...	500
A woman named Fanny with her three children, Major, Nelson, and Mary, to the same for the sum of	850
A woman named Winy with her children, Becky and Marius, to the same for the sum of	700
A woman named Jenny, aged about to the same for the sum of.....	500
	$126,900

33 Which being all the property shown to me by the testamentary executor, I have closed the proces verbal in the presence of the before mentioned witnesses, and the parties, together with the purchasers, who hereby acknowledged the sale at the prices and terms aforesaid.

(Signed)

RICHARD RELF,
A. PIGNEGUY,
L. LECESNE,
MICHEL FORTIER, JR.,
OMER FORTIER,
L. MOREAU LISLET,
Déffenseur des héritiers absent.
THO'S BEALE,
Register of Wills.

Et aujourd'hui vingt-septiéme jour du mois de Janvier de l'an de notre Seigneur mil huit cent quatorze, et le trente-huitiéme de l'Independence des Etats-Unis d'Amérique, heure de midi, nous, Thomas Beale, Register des Testaments pour la ville et paroisse de la Nouvelle Orléans, nous sommes transportés àu café de la Nouvelle Bourse á l'effet d'y procéder á la vente, de plusieurs negrès, provenant de la succession de feu Sieur Daniel Clark ou étant, nous avons trouvé le Sieur Richard Relf, l'un des Exécuteurs Testamentaires du défunt, Louis Moreau Lislet, avocat nommé par la cour pour représenter les héritier absens, et avons en leur présence et en celle des Sieurs Prosper, Prieur et Sébastien Blondeau, proclamé la susdite vente á haute et intelligible voix aux termes et conditions suivantes:

Savoir.

Payable á six mois de crédit en billets endossés á la satisfaction de l'exécuteur testamentaire avec hypothequé spéciale jusqu'au parfait payement, et après avoir successivement exposé tous les divers negrès provenant de la succession de feu dit Sieur Daniel Clark, nous régister susdit et tous signé les avons tous retirés du consentement des partis, attendu qu'ils n'ont pu s'éléver au prix d'estimation et ont les parties et témoins signé avec nous après lecture les mêmes jours, mois et an, que dessus et nous sommes retirés.

(Signé) RICHARD RELF,
PROSPER PRIEUR,
BLONDEAU.

UNITED STATES OF AMERICA,
State of Louisiana:

Second district court for the parish of Orleans.

I, M. O. Tracy, clerk of the second district court for the parish of Orleans, do hereby certify, that the foregoing is a true and cor-
34 rect copy of the originals now on file and of record in this court, in the matter of the succession of the late Daniel Clark.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this sixteenth day of April, in the year of our Lord, one thousand eight hundred and seventy-two, and in the ninety-sixth year of the Independence of the United States of America.

M. O. TRACY, *Clerk.*

I, Louis Duvigneaud, sole judge of the second district court for the parish of Orleans, do hereby certify that M. O. Tracy is the clerk of said court; that the same is a court of record having probate jurisdiction, and that the signature M. O. Tracy, clerk, to the foregoing certificate, is in the proper handwriting of him, the said M. O. Tracy, clerk; to his official acts as such, full faith and credit are due and owing; and I do further certify, that his attestation is in due form of law.

Given under my hand, at the city of New Orleans, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

L. DUVIGNEAUD, *Judge.*

And the other slaves payable at six months' credit in notes, endorsed to the satisfaction of the testamentary executor and special mortgage until final payment.

A plantation situated six leagues above this city, on the left bank of the river, having twenty-four and a half arpents, more or less in front, and extending back as far as the lake, bounded on one side by Mr. William Kenner, and on the other side by Mr. Jacques Fortier, and known by the name of Cannes Brulées, with all the implements of husbandry, animals, cattle, etc., and forty slaves, viz: Adam, Hector, Lubin, William, Ketey, Kate, Sylvia, James, Stephens, Doctor Davy, Antoine, Figaro, Stewart, Dave, Jim, Eliza, Maurice, Rose, Lindor, Providence, John, Julia, Andrew, Moses, Hannah, Kitty, Rosette, and her child, Bob, Macdaniel, Laurence, Franky and her four children, John, Charley, McKinsey, and Margerit; Judah and her three children, John, Quaks, and Jenny, Toby, which struck off and adjudged to Messes. Michel Fortier, jr., and Omer Fortier, for the sum of one hundred and twenty thousand dollars.....	$120,000
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A woman named Sarah, about years old to the same for..	500
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A woman named Winy with her children, Becky and Marius, to the same for the sum of	700
A woman named Jenny, aged about to the same for the sum of.....	500
	$126,900

33 Which being all the property shown to me by the testamentary executor, I have closed the proces verbal in the presence of the before mentioned witnesses, and the parties, together with the purchasers, who hereby acknowledged the sale at the prices and terms aforesaid.

(Signed) RICHARD RELF,
A. PIGNEGUY,
L. LECESNE,
MICHEL FORTIER, JR.,
OMER FORTIER,
L. MOREAU LISLET,
Déffenseur des héritiers absent.
THO'S BEALE,
Register of Wills.

Et aujourd'hui vingt-septiéme jour du mois de Janvier de l'an de notre Seigneur mil huit cent quatorze, et le trente-huitiéme de l'Independence des Etats-Unis d'Amérique, heure de midi, nous, Thomas Beale, Register des Testaments pour la ville et paroisse de la Nouvelle Orléans, nous sommes transportés au café de la Nouvelle Bourse á l'effet d'y procéder á la vente, de plusieurs negrès, provenant de la succession de feu Sieur Daniel Clark ou étant, nous avons trouvé le Sieur Richard Relf, l'un des Exécuteurs Testamentaires du défunt, Louis Moreau Lislet, avocat nommé par la cour pour représenter les héritier absens, et avons en leur présence et en celle des Sieurs Prosper, Prieur et Sébastien Blondeau, proclamé la susdite vente á haute et intelligible voix aux termes et conditions suivantes:

Savoir.

Payable á six mois de crédit en billets endossés á la satisfaction de l'exécuteur testamentaire avec hypothequé spéciale jusqu'au parfait payement, et après avoir successivement exposé tous les divers negrès provenant de la succession de feu dit Sieur Daniel Clark, nous régister susdit et tous signé les avons tous retirés du consentement des partis, attendu qu'ils n'ont pu s'éléver au prix d'estimation et ont les parties et témoins signé avec nous après lecture les mêmes jours, mois et an, que dessus et nous sommes retirés.

(Signé) RICHARD RELF,
PROSPER PRIEUR,
BLONDEAU.

UNITED STATES OF AMERICA,
State of Louisiana :

Second district court for the parish of Orleans.

I, M. O. Tracy, clerk of the second district court for the parish of Orleans, do hereby certify, that the foregoing is a true and cor-
34 rect copy of the originals now on file and of record in this court, in the matter of the succession of the late Daniel Clark.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this sixteenth day of April, in the year of our Lord, one thousand eight hundred and seventy-two, and in the ninety-sixth year of the Independence of the United States of America.

M. O. TRACY, *Clerk.*

I, Louis Duvigneaud, sole judge of the second district court for the parish of Orleans, do hereby certify that M. O. Tracy is the clerk of said court; that the same is a court of record having probate jurisdiction, and that the signature M. O. Tracy, clerk, to the foregoing certificate, is in the proper handwriting of him, the said M. O. Tracy, clerk; to his official acts as such, full faith and credit are due and owing; and I do further certify, that his attestation is in due form of law.

Given under my hand, at the city of New Orleans, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

L. DUVIGNEAUD, *Judge.*

[Translation of French portion of Exhibit B.]

And on this 27th day of the month of January, 1814, and of the Independence of the United States the thirty-eighth, I, Thomas Beales, register of wills for the city and parish of New Orleans, repaired, at the hour of 12 m., to the bar of the New Exchange, for the purpose of selling several negroes belonging to the succession of the late Daniel Clark, where I found Richard Relf, esq., one of the testamentary executors of the deceased, Louis Moreau Lislet, an attorney appointed by the court to represent the absent heirs, and in their presence as well as in the presence of Prosper Prieur and of Sebastian Blondeau, I proclaimed, in high and intelligible voice, the said sale upon the following terms and conditions, to wit:

Payable at six months' credit by notes endorsed to the satisfaction of the testamentary executor, with a special mortgage until final payment; and, after having successively exposed all the various negroes belonging to the succession of the late Daniel Clark, I, the said register, with the consent of all the parties, and in the presence of the witnesses who have hereunto signed with me on the day, month, and year aforesaid, withdrew them all for the reasons that they did not come up to the appraised value, and I then retired.

(Signed) RICHARD RELF,
PROSPER PRIEUR,
BLONDEAU.

35 *Exhibit C, annexed to Mrs. Kenner's answer.*

Act of sale by succession D. Clark, to O. and M. Fortier.—Filed April 20th, 1872.

Pardevant Marc Lafitte, notaire public, dûment commissionné pour la ville et paroisse de la Nouvelle Orléans, Second District Sénatorial de l'Etat de la Louisiane, y demeurant et en présence des témoins ci après nommés er soussignés.

Fut présent Monsieur Richard Relf, demeurant en cette ville, lequel au nom et comme Exécuteur Testamentaire de feu sieur Daniel Clark, et en cette qualité Administrateur des biens composant sa Succession, a dit que par suite d'adjudication sur enchère fait le huit de ce mois par le Register de la Cour des preuves de cette ville, après les publications et délais préscrits par la loi, le comparant en sa dite qualité vend, cède et transporte, d'abondant par ces presentes avec promesse de garantir de tous troubles, évictions, et autres empêchements quelconques, ainsi que de toutes dettes et hypothèques même de celle portées au certificat du conservateur en cette ville, à la date du jour d'hier, et dont il sera ci après fait mention.

A messieurs Michel Fortier et Omer Fortier, tous deux fils de Monsieur Jacques Fortier, ici tous deux présents et acceptants, acquéreurs pour eux leurs héritiers où ayant causes; une habitation située dans cette paroisse à cinq lieues par en haut de la ville, et sur la rive gauche du Mississippi, bornée par en haut par l'habitation de Mr. Wm. Kenner, et par en bas de celle de Mr. Jacques Fortier, la dite habitation ayant vingtquatre aapents et demi ou environ de face au fleuve sur une profondeur qui s' étend jusqu'au lac Pontchartrain. Ensemble tous les batimens, édifices, animaux, bestiaux, outils, instruments aratoires et autres dépendances de la dite habitation; plus quarante esclaves dont les noms suivent savoir: Adam, Hector, Lubin, William Ketty, Kate,

Sylvia, James, Stephen, Doctor Davy, Antoine, Figaro, Stewart, (Rosette et son enfant Bob,) Dave, Little Jim, Eliza, Morris, Rose, Lindor, Providence, John, Julia, Andrew Mos s, Hannah, Ketty, McDaniel, Lawrence, (Franky et ses quatre enfants Jean, Charles, McKensy et Mary, (Judah et ses trois enfants, John, Quakou and Jenny,) and Toby: tels que tous les biens sus désignés se poursuivent et comportent sans en rien réserver ni excepter et dépendants de la Succession du Sieur Daniel Claak qui avait acheté cette habitation de Mr. Stephen Henderson par acte au rapport de Mr. John Lynd, notaire public, à la date du seize Décembre, mil huit cent douze.

La presente vente est faite pour et moyennant la somme de cent vingt mille piastres prix pour laquelle la dite habitation et les quarantes esclaves sus dénommés ont été adjugés aux Sieurs acquéreurs, et laquelle somme de cent vingt mille piastres, promettent et s'obligent conjointement et solidairement l'un pour l'autre, un d'eux seul pour le tout de payer au sieur vendeur ou ayant causes de la manière suivante, savoir; une somme de quatre vingt mille piastres, divisée en six termes égaux, de
treize mille trois cent trente trois piastres chacun, payables d'année
36 en année, et dont le premier terme échura au premier Mars mil
huit cent quinze, et les autres successivement au premier Mars de chaque année, jusqu'au premier Mars mil huit cent vingt; et les quarante mille piastres de solde du prix principal seront payable au premier jour du mois de Mai de l'année mil huit cent vingt deux, lesquelles quarante mille piastres de solde poreront un intérêt à raison de six pour cent par an, payable tous les ans à commencer du premier Mars mil huit cent quinze jusqu'au payement du capital, le premier payement d'intérêts à écheoir au premier Mars mil huit cent quinze sera d'une somme de trois mille quatre cents piastres, et les autres payments d'intérêts seront de deux mille quatre cents piastres chaque année, et pour sureté et garantie du payement tant du principal que des intérêts ci-dessus stipulés, les sieurs acquéreurs consentent que l'habitation et les quarantes esclaves qui leurs sont vendus en ces présentes soyent et demeurent affectés et hypothéqués, et qu'inscription en soit prise au bureau du conservateur pour tenir et avoir lieu jusqu'au parfait payement.

Et attendu que d'après le certificat du conservateur il est constaté que la dite habitation et la majeure parti des esclaves sus désignés et vendus sont hypothéqués en faveur du Sieur Stephen Henderson, pour une somme de cent vingt mille piastres, par l'acte sus relaté du seize Décembre mil huit cent douze, et que les esclaves Hector, William, James, Rosette, Eliza, Lindor, Andrew et Moses, sont de plus sujets et font partie d'une hypothéque consentie par Kenner et Henderson, en faveur des Syndics des Créanciers de George T. Philips, le sieur vendur en sa dite qualité, promet, s'oblige de rapporter aux sieurs acquéreurs main levée des dites hypothéques a fur et a mesure des payments qu'ils effectueront, de manière qu'au final payment ces hypothéques soyent entièrement éteintes.

Au présent acte sont intervenus Messieurs Norbert Fortier, Lucien Labranche et Drausin Labranche, tous trois propriétaires demeurant en cette paroisse, lesquels ont déclaré se porter volontairement pleiges et cautions solidaires avec les Sieurs Michel Fortier et Omer Fortier, envers le sieur vendeur en qualités qu'il agit pour répondre tant du prix principal et des intérêts stipulés en la présente vente que de la pleine et entière exécution d'icelle en ce qui concerne les sieurs acquéreurs.

Et sous la foi de l'exécution des présentes, le sieur vendeur ès dites qualités qu'il agit transporte au sieurs acquéreurs tous les droits de propriété qu'avait et pouvait avoir feu Sieur Daniel Clark, et que peuvent

prétendre ses héritiers sur l'habitation et dépendances ainsi que sur les quarante esclaves qui font l'objet de la présente vente pour par les dits sieurs acquéreurs qui se reconnaissent en bonne et due possession de tout, depuis l'instant de l'adjudication, jouir, faire et disposer des dits biens en toute propriété comme leur appartenant, au moyen de l'adjudication et des présentes. Car ainsi etc., promettant etc., obligeant etc., renoncont etc. Dont Acte fait et passé à la Nouvelle Orleans, en l'étude le onzième jour du mois de Novembere de l'année mil huit cent treize, la trente huitième de l'Indépendance Américaine, en présence des Sieurs Jean Baptiste Grégoire Veron et Michel Jean Baptiste Louis
37 Fourcisy, tous deux témoins requis et domiciliés en cette ville, lesquels ont ainsi que toutes les parties comparantes signé avec moi notaire après lecture faite.

(Original signed)

RICHARD RELF, *Ex'r.*
MICHEL FORTIER, JR.,
OMER FORTIER,
NOR. FORTIER,
LN. LABRANCHE,
D. LABRANCHE,
VERON,
FOURCISY,
MC. LAFITTE,
Notaire Public.

STATE OF LOUISIANA,
Parish of Orleans, city of New Orleans:

I, Andrew Hero, jr., a notary public, and the custodian of notarial records in and for this parish and city, duly commissioned and qualified, do hereby certify the above and foregoing to be a true and correct copy of the original act extant in the notarial records of Marc Lafitte, late a notary in this city, and whose notarial records I holdas custodian thereof.

Attest my hand and seal of custodian aforesaid, at New Orleans, this 12th April, A. D. 1872.

ANDREW HERO, JR.,
Custodian of Notarial Records.

[Translation of Exhibit C.]

Before Marc Lafitte, notary public in and for the city and parish of New Orleans, second senatorial district of the State of Louisiana, therein residing, and in presence of the witnesses hereinafter named and undersigned,

Personally appeared Richard Relf, esq., a resident of this city, who, in the name and as testamentary executor of the late Daniel Clark, declared that by reason of the adjudication, at public sale, made on the 8th of the present month by the register of the court of probate of this city, after the publications and delays prescribed by the law, he does, by these presents, and in his said capacity, assign and convey with promise of guaranty against all troubles, ejections, and other impediments whatsoever, as well as against all debts and mortgages, including those specified in the certificate of the recorder of this city, bearing yesterday's date, which shall hereinafter be mentioned—

To Messrs. Michel Fortier and Omer Fortier, sons of Jacques Fortier, who, being present, accept and purchase for themselves, their heirs and assigns, a plantation situated in this parish, at five leagues above the city, and on the left bank of the Mississippi, bounded on the upper line

by the plantation of Wm. Kenner, and below by that of Jacques Fortier; said plantation having about twenty-four and one-half ar-
38 pents front on the river, by a depth extending to Lake Pontchartrain, together with all the buildings, improvements, animals, cattle, tools, implements of husbandry, and other outhouses of the said plantation, also, the forty slaves whose names follow, viz: Adam, Hector, Lubin, William, Ketty, Kate, Sylvia, James, Stephen, Doctor Davy, Antoine, Figaro, Stuart, Rosette and her child, Bob, Dave, Little Jim, Eliza, Morris, Rose, Lindor, Providence, John, Julia, Andrew, Moses, Hannah, Ketty McDaniel, Lawrence (Franky and his four children, Jean, Charles, McKinsy, and Mary), Judah and her three children, John Quakow, Jenny, and Toby, without any reservation or exception as to the above described property, forming part of the succession of Daniel Clark, who had purchased this plantation from Stephen Henderson, by act before John Lynd, notary public, at the date of the 16th of December, 1812.

The present sale is made for and in consideration of the sum of one hundred and twenty thousand dollars, at which price the said plantation and the forty slaves above named were adjudged to the said purchasers, who promise and obligate themselves, jointly and in solido, one for the other, or one for both, to pay said sum of $120,000 to the said vendor or his assigns in the following manner, to wit: a sum of $80,000 divided in six equal instalments of thirteen thousand three hundred and thirty-three dollars each, payable from year to year, the first instalment falling due on the 1st of March, 1815, and the others successively on the 1st of March of each year, until the 1st of March, 1820; and the remaining forty thousand dollars of the purchase price will be payable on the 1st of March, 1822, and will bear interest at the rate of six per cent. per annum, payable every year, beginning on the 1st of March, 1815, until payment of the principal.

The first payment of interest falling due on the 1st of March, 1815, will be of $3,400, and the other payments will be of $2,400 each year; and for the security and guarantee of the payment of the principal and interest above stipulated, the said purchasers agree that the plantation and the forty slaves to them sold by these presents shall remain affected and hypothecated, and that the mortgage shall be recorded, to hold good until final payment.

And whereas by the certificate of the recorder of mortgages it appears that the said plantation and the greater part of the slaves above named and sold are mortgaged in favor of Stephen Henderson, for a sum of one hundred and twenty thousand dollars, by the above-recited act of the 16th of December, 1812, and that the slaves Hector, William, James, Rosette, Eliza, Lindor, Andrew, and Moses are moreover subject to and comprised in a mortgage given by Kenner and Henderson in favor of the syndics of the creditors of George T. Phillips, the said vendor, in his said capacity, binds himself to report to the said purchasers release of said mortgages in proportion as the payments are by them made, so that upon their final payment these mortgages shall be entirely cancelled.

To the present act having intervened Messrs. Norbert Fortier, Lucien Labranche, and Drausin Labranche, all three owning property
39 and residing in this parish, who have voluntarily and jointly offered themselves as warrantors and bondsmen of Michel and Omer Fortier, to secure to the said vendor, in his said capacity, the payment of the principal as well as of the stipulated interest of the present sale, and the full and entire execution of all the conditions by the said purchasers.

And in faith of the execution of these presents, the said vendor, in his said capacity, conveys to the said purchasers, who hereby acknowledge full possession from the time of the adjudication, all the rights of ownership that the late Daniel Clark had or may have had, as well as those that may be set up by his heirs, to the plantation and the forty slaves which form the object of the present sale.

Thus done and passed at New Orleans, in my office, on the 11th day of November, 1813, the 38th of the Independence of the United States, in presence of Jean Baptiste, Gregoire Veron and Michel Jean Baptiste Louis Fourcisy, competent witnesses, domiciliated in this city, who have with all the other parties to this act signed with me, notary, after reading thereof.

(Signed) RICHARD RELF,
Executor.
MICHEL FORTIER, JR.
OMER FORTIER.
N. FORTIER.
LN. LABRANCHE.
D. LABRANCHE.
VERON.
FOURCISY.
MC. LAFITTE,
Notary Public.

Exhibit D, annexed to Mrs. Kenner's answer.—Act of sale, Fortiers to Saul and Croghan.—Filed April 20th, 1872.

Pardevant, Marc Lafitte, notaire public commissionné pour la ville et paroisse de la Nouvelle Orléans, second district senatorial de l'Etat de la Louisiane, y demeurant et en présence des témoins ci-aprés nommés et soussignés.

Fut présent Mons. Omer Fortier, habitant propriétaire aux Cannes Brulées en cette paroisse, lequel tant en son nom personnel qu'au nom de Mr. Jacques Fortier, son père, qui est héritier naturel de feu Mr. Michel Fortier, son fils, frére du comparant, et pour lequel il se porte fort, déclare, vendre, céder et transporter comme de fait aux dits noms il vend, céde et transporte dès maintenant et á toujours sous les guaranties ordinaires——

Aux Sieurs George Croghan, habitant, et Joseph Saul, caissier de la Banque des Etat-Unis, résidens en cette dite paroisse á ce présens
40 et acceptant acquéreurs solidaries pour eux leur héritiers et ayant causes: Une habitation située dans cette paroisse á cinq lieues au dessus de cette ville, et sur la même rive, bornée du côté supérieur par l'habitation de Mr. Kenner et du côté inférieur par celle du Sieur Jacques Fortier; la dite habitation de la contenance de vingt quatre arpens et demi de face au fleuve au environ, sur une profondeur qui s'étend jusqu'au Lac Pontchartrain, ensemble tout les bâtimens, édifices et circonstances et dépendences de la dite habitation, et les animaux, bestiaux, outils et instrumens aratoires, ci-après décrits savoir: cinq cents arpens environ de cannes rejetons pour cent arpens de jeunes plans environ; trente-deux bœufs, huit vaches á lait, dix jeunes bouvards ou gazelles, vingt cinq chevaux et mulets, soixante et dix moutons, quatre charettes, deux charettes á chevaux, dix charrues, dix huit pelles, dix-huit hâches et trente pioches, plus, quarante esclaves dont les noms suivent savoir: Jim, Davis, Hector, Lindor, Adam, Providence, Anthony, Stephen, Steward, Figaro, Joseph, Casimir, Navice, Prince,

Charles, Nace, George, Sam, Absolum, Tom, tous nègres et Joseph et Joseph, mulatres, Modeste, Judah, Fanny, Hannah, Betsey, Kate ditte Catherine, July, Sarah et Eliza, négresse, Jim, Nelson, John, Major, Coicon, négrillions, Felicity, négritte, et trois enfans en bas âge.

Tels que les dits biens sus désignés se poursuivent et comportent sans en rien distraire ou accepter, tous les quels habitation, esclaves et autres objets présentement vendus, ont été bien et dûment examinés et visités par les dits Sieurs George Croghan et Joseph Saul, acquéreurs qui déclarent qu'ils en sont contens et satisfaits et que quant aux esclaves ils renoncent dès á prèsentá toute action redhibitire qu'ils pouraient exercer en vertu de la présente vente pour aucun vice ou défaut ou maladie dont les dits esclaves pourraient se trouver entachés, et ils les achétent tels qu'ils sont sans autre guarantie de la part des vendeurs, quant aux dits esclaves seulement que de la propriété d'içeux déclarant en outre les bien connaître dès avant la présente vente, ainsi que leurs qualités, talens, défaut ou maladies.

La ditte habitation, circonstances et dépendences et les dix-huit négres suivans, savoir: Adam, James, David, Hector, Lindor, Providence, Authony, Stephen, Stewart, Figaro, Judah, Hannah, Kate, Julie, Eliza, Jim, John et Coicon, appartiènnent aux sieurs vendeur en vertu de l'acquisition qu'ils en ont faite du Sieur Richard Relf, executeur testamentaire de feu Daniel Clark, par acte au rapport du notaire soussigné en date du onze Novembre, mil huit cent treize, et les vingt-deux y compris les trois enfans en bas âge déja rappeles, négres, Norris, Charles, Joseph, Casimir, Prince, Nace, George, Sam, Absolon, Tom, Modeste, Fanny, Betsey, Sarah, Nelson, Major, Felicité et les deux mulatrês, Joseph et Joseph, appartiennent également aux dits vendeurs en vertu de diverses acquisitions dont les acquéreurs se sont assurés dès avant la présente vente et desquels ils ont déclaré être satisfaits et contents, et nous ont dispensé nous notaire de les mentionner, au présent acte, les dits dix-neuf esclaves derniérement nommés et les trois enfans se trouvent libres d'hypothéques, ainsi qu'il résulte du certificat du conservàteur en date de ce jour ici
41 représenté, et dont les parties declarent avoir pris connaissance.

La ditte habitation ét les dix-huit négres premièrement nommés sont sujets d'après le mème certificat á plusieurs hypothéques dont il sera ci-après parlé et sur lesquelles il sera statué.

La présente vente est faite pour et moyennant la somme de cent vingt mille piastres que les acquéreurs s'obligent solidairement un seul pour le tout á payer aux vendeurs en la forme suivante, savoir: quatre-vingt mille piastres divisées en six termes égaux, de treize mille trois cent trente-trois piastres trente-trois cents $\frac{1}{3}$ chacun, payayble d'année en année, et dont le premier terme échoira le premier Mars, de l'année mil huit cent dix-neuf, et les autres successivement au premier Mars de chaque année suivante, jusqu'au premier Mars de l'année mil huit cent vingt-quartre. Treize mille trois cent trente-trois piastres trente-trois cents $\frac{1}{3}$ que le sieur vendeur en son nom et en sa qualité reconnait avoir reçu comptant à la vue de nous notaire et témoin soussignés, en billets de banque ayant cours dans cet Etat, et vingt-six mille six cent soixante-six piastres soixante-six cents $\frac{2}{3}$ payable en deux termes égaux, en Mars mil huit cent vingt-cinq, et en Mars mil huit cent vingt-six, lesquelles dites vingt-six mille six cent soixante-six piastres soixante-six cents $\frac{2}{3}$, porteront un intérèt de six pour cent par an, á compter depuis le jour de la présente vente, payable tous les premier Mars de chaque année, jusqu'au mois de Mars, mil huit cent vingt-cinq, époque du payement de la moitié de la dite somme, et ensuite pour l'année suivante le dit intérèt de six pour cent continuera sur l'autre moitié et deviendra

exigible avec le capital, savoir: treize mille trois cent trente-trois piastres trente-trois cents ⅓ (un tiers) le premier Mars mil huit cent vingt-six, époque de l'entier et parfait payement du prix de l'achat sus mentionné.

L'habitation ci-dessus décrite ainsi que les dix-huis esclaves sus nommés sont grevés des hypothèques suivantes, ainsi qu'il appert par le certificat du conservateur des hypothèques en date de ce jour déja rappelé, savoir: en faveur de la succession de feu Sieur Daniel Clark, de la somme de quatre-vingt mille piastres pour solde du prix d'achat à compte duquel les vendeurs ont payé à la dite succession une somme totale de quarante mille piastres, ainsi que les intérèts échus sur la somme de quarante mille piastres, (selon l'acte de vente du dit Sieur Richard Relf, est qualités en faveur des vendeurs ci-dessus mentionnés,) jusqu'au mois de Mars de l'année mil huit sent dix-sept. En outre la dite habitation et esclaves sont aussi par le même acte de vente hypothéqués pour sureté du payement annuel des intérèts sur la dite somme de quarante mille piastres, jusqu'au premier Mai, mil huit cent vingt-deux, époque ou le payement de la dite somme de quarante mille piastres, devra s'effectuer entre les mains du Sieur Winthrof Sergent, cessionnaire des droits de S. J. Trusk, par acte devant John Lynd, notaire, en date du quinze Avril, mil huit cent quatorze. La dite habitation et les dits esclaves sont en outre sujet á l'hypothéque consentie par feu Daniel Clark, en faveur de Stephen Henderson, vendeur de la dite habitation et négres, par acte devant John Lynd, notaire public, pour sureté de cent vingt mille piastres dont quatre-vingt
42 mille payable au dit Sieur Stephen Henderson, et ses quarante mille pour solde payable á J. Israel Trask en Mars, mil huit cent vingt-deux, avec les intérèts á raison de six pour cent par an, sur les quelles quatre-vingt mille piastres le dit Sieur Stephen Henderson recçu á compte quarante mille piastres de la succession du dit Sieur Daniel Clark, ce qui réduit la présente hypothèque en faveur du dit Stephen Henderson á quarante mille piastres.

Les négres, Hector, Lindor et Eliza, sont sujets à une hypothéque dont le solde est maintenant de quinze mille neuf cent quarante piastres quarante cents ½, consentie sur les dits esclaves et sur d'autres propriétés par Messieurs Kenner et Henderson, par acte devant feu P. Pédesclaux, notaire public, le vingt-quatre Mai, mil huit cent dix, en faveur de J. Johnson, J. C. Williamson et William Note, syndics des créanciers de G. T. Philips. Les sieurs acquéreurs se sont assurés que les intérèts dus au Sieur Winthrof Sergent sus mentionné sont éte payés par les Srs. vendeurs jusqu'au mois de Mars mil huit cent dix-sept, et les vendeurs prennent l'obligation de continuer a payer les dits intérèts à qui de droit sur la dite somme de quarante mille piastres, suivant la forme et teneur de l'acte de vente précité du onze Novembre, mil huit cent treize, au raport du notaire soussigné et à executer et remplir toutes les conditions de payement qui leur sont imposées par le dit acte, et à rapporter main levée des hypothèques ci-dessus mentionnèes à fur et a mesure qu'ils les éteindront jusqu'a l'année mil huit cent vingt-deux, terme auquel toutes les hypothèque sus-dites devront être annullées et éntientes à la diligence des sieurs vendeurs, et dont ils s'obligent d'apporter main levée pleine et entière aux sieurs acquéreurs. De leur côté les sieurs acquéreurs s'obligent à payer fidelement les sommes ci-dessus mentionnées aux termes stipulés dans le présent acte moyennant que les dites sommes, comme il a été déja dit soient employées par les vendeurs au payement des sommes dont ils se trouvent

ou pourront se trouver redevable pour le prix de la dite habitation et négres jusqu'a ce que le dit payement soit effectue en entier.

Les sieurs acquéreurs déclarent avoir bien et dûment examiné les titres de propriété de la dite habitation tant l'acte de vente du onze Novembre, mil huit cent treize, précité que celui du seize Décembre, mil huit cent douze, au rapport de John Lynd, notaire public et autres, et qu'ls sont contens et satisfaits du tout, ils déclarent en outre être en possession de tout les objets mentionnés au présent acte. Et au plein et entier accomplissement de toutes les clauses et conditions stipulées de la part des acquéreurs au présent acte et pour sureté du payement de la somme de cent soixante mille six cent soixante-six piastres soixante-six cents $\frac{2}{3}$, et des intérêts sur celle de vingt-six mille six cent soixante-six piastres soixante-six cents $\frac{2}{3}$ aux termes et installemens mentionnés et stipulés dans le présent acte, les dits sieurs acquéreurs affectent et hypothèquent spécialement et par privilége et préférence en faveur des vendeurs la dite habitation circonstances et dépendences, animaux, outils, instruments, aratoires et autres objets mentionnés au présent acte, comme faisant partie de la dite habitation et les quarante esclaves sus nommés, ils consentent qu'inscription de la présente hypothèque
43 soit prise sur les régistres du conservateur des hypothèques, ils consentent également que faute par eux d'exécuter et parfaire le payement d'aucune des sommes sus-mentionnés aux époques sus désignéesil soit loisible aux sieurs vendeurs d'avoir recours à la voie de l'execution parce pour les y contraindre sur simple présentation à tout Juge compétent de la copie des présentes et qu'en vertu de ce la vente judiciare de la dite habitation, négres et autres objets hypothèqués, soit faite au profit des sieurs vendeurs de manière à ce que les dits sieurs vendeurs soient payés de la somme et intérêts qui pourraient être dûs en faisant vendre pour les surplus aux mémes échéances que celles stipulés dans la présente vente, sans préjudice pour les vendeurs de tous autres recours de droit contre les sieurs acquéreurs en cas que ceux-ci ne remplissent pas les obligations qui leurs sont imposées par la présente vente, lesquelles sont de rigueur, et sans lesquelles le sieur vendeur tant en son nom qu'en sa qualité déclare que la présente vente n'aurait pas eu lieu.

Et vu la somme de qurante mille piastres déja payée par les sieurs vendeurs sur leur prix d'achat de l'habitation et le plein état de solvabilité de Mrs. Norbert Fortier, Lucien La Branche et Drausin La Branche, cautions données à la succession du Sieur Daniel Clark, par les dits vendeurs en l'acte précité passé au rapport du notaire soussigné le onze Novembre, mil huit cent treize, au moyen de quoi les acquéreurs se regardent comme parfaitement guarantis et à l'abri de tout recours d'aucune personne autre queles parties au présent acte qui pourrait avoir aucun intérèt dans le dit acte, les acquéreurs déclarent que l'exécution des obligations par eux prises et ci-dessus stipulées en faveur des sieurs vendeurs est indépendente de celle des obligations auxquelles les dits vendeurs peuvent s'être soumis pour raison de la vente susdite du onze Novembre, mil huit cent treize, si ce n'est en ce qui regarde l'emploi de ce qui devra être payé par les sieurs acquéreurs aux sieurs vendeurs, lequel devara être fait suivant ce que a été ci-dessus stipulé.

Les sieurs acquéreurs ont tout présentement et à la vue de nous notaire déliveré aux sieurs vendeurs leurs six billets par eux souscrits et endossés par l'un des sieurs acquéreurs, pour la somme de quartre-vingt mille piastres ci-dessus mentionnée, comme partie du prix d'achat de l'habitation et objects présentement vendus, chacun desquels billets est de la somme de treize mille trois cent trente-trois piastres trente-trois cents $\frac{1}{3}$,

dont le premier est payable le premier Mars, mil huit cent dix-neuf, et les cinq autres le premier Mars de chaque année suivante, jusqu'en mil huit cent vingt quatre, dont les vendeurs consentent en faveur des dits acquéreurs bonne et valable quittance et décharge payés que soient les dits billets à leurs échéances respectives, les dits billets ont été paraphés par moi nataire soussigné, ne variétur.

Au moyen de tout quoi le Sieur Omer Fortier, fils, tant en son nom qu'en celui du Sieur Jacques Fortier, son père céde aux acquéreurs tous les droits de propriété et autres qu'ils ont ou peuvent avoir dans l'habitation et les objets et négres présentement vendus et les transportent aux acquèreurs pour que ceux-ci puissent en jouir, faire et disposer comme de chose á eux appartenans aux moyens des présentes, car ainsi, etc., dont acte.

44 Fait est passé à la Nouvelle Orléans, en l'étude le neuf Janvier mil huit cent dix-huit, l'an quarante-deuxieme de l'Indépendance des Etat-Unis d'Amérique, en présence do Messrs. Jean Louis Francois Chatry et Jacques Joly, témoins domiciliés qui ont signé avec les parties et le notaire public soussigné après lecture faite.

(Original signed)

OMER FORTIER,
JOS. SAUL,
G. GROGAN,
T. JOLY,
CHATRY,
Mc LAFITTE,
Notary Public.

STATE OF LOUISIANA,
Parish of Orleans:

I, Andrew Hero, jr., notary public, and the custodian of notarial records in and for this parish and the city of New Orleans, duly commissioned and qualified, do certify the foregoing as a true and correct copy of the original act extent in the notarial records of Marc Lafitte, late a notary public in this city, and whose notarial records I hold as custodian thereof.

Attest my hand and seal of custodian aforesaid, at New Orleans, this 12th April, A. D. 1872.

ANDREW HERO,
Notary Public and Custodian of Notarial Records.

[Translation of Exhibit D.]

Before Marc Lafitte, a notary public, commissioned for the city and parish of New Orleans, second senatorial district of the State of Louisiana therein residing and in presence of the undersigned witnesses, personally appeared Mr. Omer Fortier, a planter at the Cannes Brulees, in this parish, who, in his individual name, as well as in the name of Jacques Fortier, his father, whom he represents, and who is the natural heir of his late son Michel Fortier, brother of the appearer, does, by these presents, sell, assign, and convey, now and forever, with the ordinary warranty.

To George Croghan, a planter, and Joseph Saul, cashier of the United States Bank, residing in this parish, here present and purchasing jointly for themselves, their heirs and assigns, a plantation situated in this parish at five leagues abeve this city, bounded above by the plantation of Mr. Kenner and below by that of Jacques Fortier, said plantation measuring about twenty-four and a half arpents front on the

river by a depth extending to Lake Pontchartrain, together with all the buildings, appurtenances, and outhouses of the said plantation, and the animals, cattle, tools, and implements of husbandry hereinafter described, viz: About five hundred arpents of ratoon canes for about one hundred arpents of plant cane, thirty-two oxen, eight milch cows,
45 ten young , twenty-five horses and mules, seventy sheep, four wagons, two horse carts, ten plows, eighteen shovels, eighteen axes, and thirty spades; also forty slaves, named as follows, viz: Jim, Davis, Hector, Lindor, Adam, Providence, Anthony, Stephen, Stewart, Figaro, Joseph, Casimer, Narice, Prince, Charles, Nace, George, Sam, Absolum, Tom, all black men, and Joseph and Joseph, mulattoes; Modeste, Juda, Fanny, Hannah, Betsey, Kate alias Catharine, July, Sarah, Eliza, black women; Jim, Nelson, John, Major, Coicon, black boys; Felicity, young black woman with three children.

All of the above-described property, as they stand, without any exception including the plantation, slaves and other things presently sold have been well and duly examined and visited by the said purchasers, George Croghan and Joseph Saul, who are well satisfied with them; and as far as the slaves are concerned, they hereby relinquish their right for setting aside this contract, on account of any vice, defect or sickness which they may be subject to, and purchase them, as they are, without any other guarantee on the part of the vendors; the purchasers further declare that they have known the said slaves prior to the present sale, and that they are well informed as to their qualities, talents, defects or diseases.

The said plantation and appurtenances, and the following-named eighteen negroes, viz: Adam, James, David, Hector, Lindor, Providence, Anthony, Stephen, Stewart, Figaro, Judah, Hannah, Kate, Julia, Eliza, Jim, John, and Coicon, belong to the said vendors by virtue of their purchase from Richard Relf, testamentary executor of the late Daniel Clark, per act before the undersigned notary, dated 11th November, 1813, and the twenty-two, including the three above mentioned children Nims, Charles, Joseph, Casimer, Prince, Nace, George, Sam, Absalon, Tom, Modeste, Fanny, Betsey, Sarah, Nelson, Major, Felicite and the two mulattoes, Joseph and Joseph, also belong to the said vendors by virtue of sundry acquisitions, known to the purchasers prior to the present sale and with which they are satisfied, thereby relieving the undersigned notary from the necessity of making any mention thereof in the present act. By the annexed certificate of the recorder of mortgages, dated this day, and exhibited to the parties hereof, the nineteen last named slaves, and the three children are free of any mortgage.

It appears from the same certificate, that the said plantation and the eighteen first-named negroes are subject to several mortgages which shall hereinafter be described.

The present sale is made for and in consideration of the sum of one hundred and twenty thousand dollars, which the purchasers jointly bind themselves, one for all, to pay to the said vendors in the following manner, to wit: eighty thousand dollars divided in six equal instalments of thirteen thousand three hundered and thirty-three and one-third dollars, payable from year to year, the first instalment falling due on the 1st of March, 1819, and the others successively on the 1st of March of each following year, up to the 1st of March, 1824, $13,333.33⅓ which the said vendor individually and in his said capacity, and in presence of the undersigned notary and witnesses, acknowledges to have received in cash, in current bank notes of this State, and
46 $26,666.66⅔, payable in two equal instalments in March, 1825, and

March, 1826, which said $26,666.66⅔, will bear interest at the rate of six per cent. per annum from the day of the present sale, payable on the 1st of March of each year, until the month of March, 1825, when the one-half of said sum shall become due; then the stipulated interest of six per cent. will continue for the succeeding year on the other half and shall be exigible with the principal, viz: $13,333.33⅓ on the 1st of March, 1826, when the term of the entire and perfect payment of the purchase price shall have expired.

By the aforementioned certificate of the recorder of mortgages, dated this day, it appears that the above-described plantation as well as the aforesaid eighteen slaves are encumbered with the following mortgages, to wit: In favor of the succession of the late Daniel Clark, for the sum of $80,000 balance due on the purchase price, in part payment of which the vendors have paid to the said succession the total sum of $40,000 with accrued interest on the sum of $40,000 (as per act of sale of Richard Relf, in his said capacity, in favor of the aforesaid vendors), up to the month of March, 1817. The said plantation and slaves are, by the same act of sale, mortgaged to secure the payment of the annual interest of the said sum of $40,000, up to the 1st of March, 1822, when the said sum of $40,000 shall have to be paid in the hands of Winthrop Sergent, esq., transferee of the rights of I. E. Trask, per act before John Lynd, notary, dated 15th April, 1814.

The said plantation and slaves are moreover subject to a mortgage granted by the late Daniel Clark, in favor of Stephen Henderson, vendor of said plantation and slaves, as per act before John Lynd, notary public, to secure $120,000, out of which $80,000 are payable to the said Stephen Henderson, and the remaining $40,000 to Israel E. Trask, in March, 1822, with interest at the rate of six per cent. per annum. On the said $80,000 the said Stephen Henderson has received $40,000 on account from the succession of the late Daniel Clark, thereby reducing to $40,000 the present mortgage in favor of Stephen Henderson.

The negroes Hector, Lindor, and Eliza are subject to a mortgage on which a balance of $15,940. 40½ remains due, given on the said slaves with some other property by Kenner and Henderson, per act before P. Pedesclaux, notary public, on the 24th of May, 1810, in favor of J. Johnson, J. C. Williams and William Nott, syndics of the creditors of G. T. Philips.

The said purchasers have assured themselves that the interest due to Winthrop Sergent have been paid by the vendors up to the month of March, 1817, and the said vendors obligate themselves to continue the payment of said interests to whomsoever they may be due, on the said sum of $40,000 according to the terms and conditions of the aforementioned act of the 12th of November, 1813, before the undersigned notary, and to execute and fulfill all the conditions of payment imposed on them by the said act; to report release of the aforementioned mortgages as they become extinguished until the year 1822, at which time all of the above-described mortgages will be annulled and cancelled,
47 and the complete and full release of same given by said vendors.

On their part, the purchasers bind themselves to faithfully pay the aforementioned sums at the time stipulated in the present act, provided that said sums, as before stated, shall be applied by the vendors towards the extinguishment of their debt for the purchase price of said plantation and negroes, until final payment.

The said purchasers declare that they have well and duly examined all the acts in relation to the title of said plantation, the aforesaid act of sale, of the 11th of November, 1813, that of the 16th of December, 1812,

before John Lynd, notary public, as well as other acts, and that they are satisfied; they declare further that they are in possession of all things mentioned in the present act. And for the purpose of securing the fulfilment of all the clauses and conditions stipulated on the part of the purchasers in the present act, as well as the payment of the sum of $106,666.66⅔, and the interest on the sum of $26,666.66⅔, in accordance with the terms and instalments mentioned and stipulated in the present act, the said purchasers specially mortgage, with privilege and preference in favor of the vendors, the said plantation, appurtenances, animals, tools, implements of husbandry and other things mentioned in the present act as appertaining to the said plantation, and the aforenamed forty slaves; they consent to the recording of said mortgage, and agree also that in case of failure on their part to execute and perfect the payment of any of the aforesaid sums at the designated time, it will be lawful for the vendors to have recourse to executory process, to compel, upon presentation to any competent judge of a copy of the present act, the judicial sale of said plantation, negroes, and other mortgaged things for the benefit of said vendors, in order to pay to said vendors the sum and interest that may be due at the time of the sale, which shall be made on the same terms as those stipulated in the present act, without prejudice to the rights of the vendors against the said purchasers, in case of their failure to fulfill the binding obligations of the present act, without which the said vendor, in his individual name and his said capacity, declares that the present sale would not have been made.

And considering the sum of $40,000 already paid by the said vendors on the purchase price of the plantation, and the undoubted solvency of Norbert Fortier, Lucien Labranche, and Drausin Labranche, sureties given by the said vendors to the succession of Daniel Clark, as per the aforesaid act before the undersigned notary, on the 11th of November, 1813, the purchasers consider themselves as perfectly secured against all recourse of any party that might have an interest in the present act, other than those directly interested in said act. The puchasers declare that the execution of their obligations as above stipulated in favor of the vendors is independent of the execution of other obligations contracted by the aforementioned sale of the 11th of November, 1813, except as to the use of the sums that will be paid by the said purchasers, which sum shall be appropriated in accordance with the aforesaid stipulations.

The purchasers have presently and before me, notary, delivered
48 to the vendors their six notes, signed by all of them, and endorsed by one of the said purchasers, for the sum of $80,000 as above mentioned, as part of the purchase price of the plantation and other things sold by these presents, each note being for the sum of $13,333.33⅓, the first of which falls due on the 1st of March, 1819, and the other five on the 1st of March of each succeeding year up to 1824, for which notes, paraphed ne varietur, by me, notary; the vendors hereby give good and valid quittance conditioned upon their payment at their respective maturities.

For the above considerations, Omer Fortier, son, in his individual name as well as in the name of his father, Jacques Fortier, conveys to the purchasers all the rights which they have or may have to the plantation, things, and slaves presently sold, and transfers them to the purchasers in full ownership by means of the present act.

Done and passed at New Orleans, in my office, on the 9th of January, 1818, in the forty-second year of the Independence of the United States of America, in presence of Jean Louis François Chatry and Jacques

Joly, domiciliated witnesses, who have signed with the parties and me, notary, and after reading thereof.

(Original signed)

OMER FORTIER,
JOSEPH SAUL,
J. JOLY,
G. GROGHAN,
CHATRY,
MC LAFITTE,
Notary Public.

Agreement.—Filed April 20th, 1872.

U. S. circuit court, eastern district of Louisiana.

MYRA CLARK GAINES *versus* P. H. MONSSEAUX ET ALS. } No. 3663.

It is agreed between the complainant in the above-entitled cause, and Eliza Davis, widow of Minor Kenner, deceased, administratrix, &c., one of the defendants, as follows:

1st. That the order entered in the order-book on the rule day, January last, that the bill of complaint filed in the case be taken pro confesso as against her, be set aside, the same having been taken and entered in error, inasmuch as pleas supported by an answer were filed in the case by her on the 5th of March, 1866, which had not been set down for a hearing, or acted on by the court.

2nd. That the complainant can at any time set down the said pleas or proceed otherwise with respect to them so as to have the same disposed of by the court in due course of law, as if they had been filed during the present term of the court.

49 3rd. That the answer of the said Eliza Davis, widow of Minor Kenner, administratrix, etc., filed in this cause, this day, by an agreement of parties, in order to speed the cause, is in no way to affect or overrule the said pleas heretofore filed by the said Mrs. Kenner, administratrix, but that the same are to be proceeded with and disposed of in due course of law, so that the said Mrs. Kenner, administratrix, will have the benefit of the said pleas in the same manner as if the answer filed had not yet been made. And

4th. That the complainant may, at any time, file a replication to the said answer filed this day, and that on notice given to the solicitor of the said Mrs. Kenner of the filing of the replication, the parties will proceed to prepare the case for a hearing upon the answer, so that if the said pleas are involved, the case may be brought to a hearing immediately after the said pleas shall have been overruled, or as soon thereafter as the expiration of the ninety day given after the filing of a replication for taking testimony will permit.

J. Q. A. FELLOWS,
For Complainant.
MILES TAYLOR,
Solicitor for Mrs. Kenner.

Exceptions to answer.—Filed May 6th, 1872.

U. S. circuit court, fifth circuit, and district of Louisiana. In chancery.

MYRA CLARK GAINES
versus } No. 3663.
P. H. MONSSEAUX ET AL.

Exceptions taken by said complainant, Myra Clark Gaines, to the insufficient answer of Mrs. Eliza Kenner, personally, and as tutrix to her said bill of complaint.

1st. For that said defendant hath not to the best of her knowledge, remembrance, information, and belief, answered and set forth whether the said Daniel Clark, deceased, did not hold the legal title to the land and real property described in said bill of complaint.

2d. For that said defendant hath not, in manner aforesaid, answered and set forth whether and what portions of the lands described in the said bill of complaint is in her possession and she has taken possession of.

3d. For that the said defendant hath not, in the manner aforesaid, answered and set forth whether she has not taken possession of, nor what are the particular portions and lots of said land so taken possession of and claimed by her separately; the time when she took possession of the same; the title and chain of title by which she pretends to hold the same; the date from which she has received the rents and revenues from the same, and the amounts of said rents and revenues.

50 4th. For this that said defendant hath not answered the several special interrogatories addressed to her in said bill of complaint, but has wholly omitted and neglected to answer the same.

In all of which particulars the said complainant excepts to the answer of said defendant as evasive, imperfect, and insufficient; complainant prays that said evasive, imperfect, and insufficient answer may be taken from the files, and that said defendant be compelled to put in a full and sufficient answer.

RACE, FOSTER & E. T. MERRICK,
FELLOWS & MILLS,
Solicitors for Complainant.

Extract from minutes.

U. S. circuit court, district Louisiana.

SATURDAY, *May 18th*, 1872.

Court met pursuant to adjournment. Present, Hon. J. P. Bradley, associate justice of Supreme Court.

* * * * * * *

MYRA CLARK GAINES
vs. } No. 3663.
P. H. MONSSEAUX ET AL.

For the reasons assigned in the written opinion of the court this day delivered and on file,

It is ordered that complainant's exception to the answers of the defendant be overruled.

* * * * * * *

Replication.—Filed May 18th, 1872.

U. S. circuit court, district of Louisiana. In chancery.

MYRA CLARK GAINES
versus
P. H. MONSSEAUX ET AL. } No. 3663.

The replication of Myra Clark Gaines to the answer of Mrs. Eliza Kenner, individually and as tutrix, defendant in the above entitled suit.

This repliant saving and reserving to herself now and at all times hereafter, all and all manner of benefit and advantage of exceptions, which may be had or taken to the manifold insufficiencies of the said answers, for replication thereunto says that she will aver, maintain, and prove her bill of complaint to be true, certain, and sufficient in the law to be replied unto by this repliant; without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is
51 true; all which matters and things this repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by her said bill, she has already prayed.

RACE, FOSTER & E. T. MERRICK,
FELLOWS & MILLS,
Solicitors for Complainant.

Amended answer of Mrs. Kenner.—Filed June 16th, 1877.

United States circuit court, district of Louisiana.

GAINES
vs.
MONSSEAUX ET AL. } No. 3663.

Amended answer of Mrs. Eliza Kenner, widow of Minor Kenner, and administratrix of his succession, and tutrix of his minor children, to the bill of complaint of said complainant.

This defendant, reserving to herself all right of exception, etc., to said bill as heretofore reserved in her answer herein, by leave of court, amends her said answer as follows, to wit:

1st. To be inserted at the end of line 22d, before line 23 on page 16 of said answer, the following words, viz:

And this defendant now pleads said final decree in said suit in bar of said complainant's bill.

2d. To be inserted at the end of page 17 of said answer, the following words and figures viz:

And this defendant further answering avers that said Daniel Clark paid no portion of the price thereof, when he purchased said plantation and slaves of the said Stephen Henderson, but he bought the same for the price of $120,000 on the following terms of credit, viz, $80,000, payable in four installments of $20,000 each, falling due January 1st, 1814, 1815, 1816 and 1817, and $40,000 payable to Israel E. Trask, May 2d, 1822, with six per cent. interest, payable annually, which payments were represented by notes secured by mortgage and vendor's lien, re-

tained in said act of sale thereof passed before John Lynd, notary public, December 16th, 1812; and said Daniel Clark had not at the time of his death paid any part of said purchase money; but that the said notes given therefor and the said mortgage were paid and extinguished by the said executors of Daniel Clark, with the money realized from the sale of said plantation and slaves, to said Michel and Omer Fortier and their vendees; and this respondent is advised and believes that even if said complainant's title is superior to that of this defendant (which she denies), she cannot be compelled to surrender said plantation until said sum of $120,000 so paid therefor with interest is restored to her.

And this respondent further answering says that she is informed and believes that all the proceedings in the premises, at and prior to said
52 sale of said plantation and slaves, on November 8th, 1813, by said register of wills, under authority of said order of said probate court for the parish and city of New Orleans, were regularly had and taken; but she avers that if any informalities or irregularities attended said sale, or the proceedings thereto subsequent to said order of said probate court, that more than five years elapsed after said sale and before the exhibition of said complainant's bill herein; and she specially pleads the prescription of five years against all such irregularities and informalities.

And defendant prays to be hence dismissed with her reasonable costs and charges in this behalf sustained, and she will ever pray, etc.

Let this amendment to the answer of Mrs. Eliza Kenner, defendant in this case, be made.

New Orleans, June 16th, 1877.

(Signed) EDWARD C. BILLINGS,
Judge.
J. D. ROUSE,
Solicitor.

Reserving her objections to the order of court allowing the above amended answer, complainant waives the jurat of defendant to said amendment.

WM. REED MILLS,
Solicitor of Myra C. Gaines.

JULY 3*d*, 1877.

EVIDENCE FOR MRS. KENNER, DEFENDANT.

Copy of sale by Henderson to Clark.—Filed July 14th, 1877.

By act passed before John Lynd, notary public, dated 16th December, 1812, Daniel Clark has bought of Stephen Henderson, a plantation situated in the parish of about five leagues above this city, and on the same side of the river, being in front on said river about twenty-four arpents and a half, bounded on the lowest side by the plantation of Jacques Fortier, and on the upper side by the plantation of Wm. Kenner, and having in depth to the Lake Pontchartrain together with all the buildings and edifices thereon, and also forty slaves of both sexes, namely, Adam, Antoine, Brown, Figaro, Hector, Kersey, Lubin, Doctor, Lindor, McDaniel, Providence, Janvier, William, Stewart, John, Conacoa, Rosette, Julia, Kitty, and her two children, Kit, Dave, Moses, Andrew, Judah, Jim, Billy, Sylvia, Eliza, Hannah, James, a blacksmith, Jack, Jim, Stephen, Morris, Tom, Doctor, Dave, Rose and Kitty: The following slaves to wit, Moses, Rosette, Jim, Hector, Lindor

and William, Andrew, Eliza and James are subject to the mortgage of S. Henderson, inscribed book 6, page 273.

The present sale is made for and in consideration of the sum
53 of one hundred and twenty thousand dollars, to be paid to the said S. Henderson, in manner and form following, that is to say:

The sum of twenty thousand dollars on the 1st day of January, which will be in the year 1814; the sum of twenty thousand dollars on the 1st day of January, 1815, the sum of twenty thousand dollars on 1st day of January, 1816, and the further sum of twenty thousand dollars on the 1st day of January, 1817; and the remaining sum of forty thousand dollars is to be paid by the said Daniel Clark unto I. E. Trask, within ten years from the 2nd day of May, 1812, together with interest thereupon, at the rate of six per centum per annum, from and after the seventeenth day of this current month. And in order to secure the payment of said sums and interest above-mentioned, the said Clark mortgages in favor of S. Henderson and I. E. Trask the above described plantation, together with the above-named slaves.

(Signed) M. DURALDE,
For Cons'r.

NEW ORLEANS, *December 21st*, 1812.

I, the undersigned recorder of mortgages, in and for the parish of Orleans, State of Louisiana, do hereby certity that the within and foregoing is a true and correct transcript from the records of my office, as recorded in book 7, folio 377 and 378, on the 21st day of December, 1812.

New Orleans, July 10th, 1877.

J. G. RICHARDSON,
Deputy Recorder of Mortgages.

Release of mortgage by S. Henderson to succession of D. Clark.—Filed July 14th, 1877.

Be it known that this day, before me, John Lynd, notary public, in and for this city of New Orleans, duly commissioned, personally appeared Stephen Henderson, of this city, merchant, who declared that he has this day received of and from Richard Relf, executor of the late Daniel Clark, of this city, deceased, for the final payment of the sum of eighty thousand dollars, which became due to him from and by the said Daniel Clark, by act passed before me, notary, 16th December, 1812, full amount and satisfaction thereof by the transfer to him of the two following described notes, to wit, one dated the ninth day of January, eighteen hundred and eighteen, drawn by G. Croghan to the order of and endorsed by Joseph Saul, for the sum of thirteen thousand three hundred and thirty-three and $\frac{1}{3}$ dollars, payable on the first day of March, 1819, and the other being of the same date, drawn by Joseph Saul to the order and endorsed by G. Croghan, for a like sum payable on the first day of March, 1820, making together the sum of twenty-six thousand six hundred and sixty-six and $\frac{2}{3}$ dollars, which with four payments previously made, three of which are recorded in this office under dates of the 26th April, 1815, 13th March, 1816, 15th January,
54 1818, and one recorded in the office of Michel DeArmas, notary public, on the 31st March, 1817, do complete the payment of the said sum of eighty thousand dollars. And the said Stephen hereby consents that a mortgage given in his favor by the said Daniel Clark,

to secure the payment of the said eighty thousand dollars before me, notary, on the 16th December, 1812 aforesaid, may be cancelled on the books of the conservator of mortgages for this State, acknowledging and granting full satisfaction and acquittance for the same.

Thus done and passed at the city of New Orleans, this sixteenth day of January, in the year eighteen hundred and eighteen, in presence of Isaac T. Preston and Hu. K. Gordon, witnesses, who hereunto sign their names with said appearer, and me, notary.

(Original signed) ISAAC T. PRESTON.
HU. K. GORDON.
S. HENDERSON.
JOHN LYND,
Notary Public.

I, the undersigned custodian of notarial records for the parish and city of Orleans, State of Louisiana, hereby certify the foregoing to be a true copy of the original act passed on the 16th day of January, 1818, before John Lynd, notary, deceased, which is now in my possession.

New Orleans, June twenty-seventh, 1877.

J. F. COFFEY,
Custodian of Notarial Records.

Assignment of mortgage by Trask to Saul.—Filed July 14th, 1877.

Be it known that this day before me, Carlisle Pollock, notary public, in and for this city of New Orleans, came Israel E. Trask, of Massachusetts, who declared that he does by these presents assign, transfer, and set over unto Joseph Saul, of this city, present and accepting a mortgage granted in his favor by Daniel Clark, late of this city, deceased, upon a plantation in this State, about five leagues above this city, and on the same bank of the river, and upon forty slaves upon and belonging to same plantation, to secure the payment of forty thousand dollars and annual interest thereon at the rate of six per centum, by act passed before John Lynd of this city, notary, on the sixteenth day of December, one thousand eight hundred and twelve, and all the right, title, interest, claim, and demand whatsoever of him, the said Israel E. Trask, of, in, and to the same.

To have and to hold the said mortgage and all interest that shall accrue thereon after the first day of March next (this appearer reserving to himself the interest to that day), to the said Joseph Saul, his heirs and assigns, to their proper use and behoof forever. And the said Israel E. Trask does also hereby appoint and in his place and stead put the said Joseph Saul to be his true and lawful attorney, irrevo-
55 cable for him, and in his name or otherwise, but to his own proper use to demand and receive the principal and interest of said mortgage, of and from the heirs or assigns of said late Daniel Clark, or whomsoever else the same may concern. And upon recovery and receipt to give sufficient discharges, to appear before all courts of law, there to do and prosecute as occasion shall require; to compound and agree for the same by arbitration or otherwise; and generally to do all that shall be requisite in the premises, in as full manner as the said Israel E. Trask would in person present; also with power of substitution and revocation. The said Israel E. Trask hereby agreeing to ratify all that shall be lawfully done by virtue hereof, and the said Israel E. Trask, for himself and his heirs hereby covenants and agrees with said Joseph Saul, his heirs and assigns that he or other person for him has

not had or received the principal sum of said mortgage, nor any part thereof, nor shall he, the said Israel E. Trask, receive or attempt to receive the same, nor in anywise release or discharge the same or any part thereof. This assignment is made for and in consideration of the sum of thirty-two thousand dollars to the said Israel E. Trask in hand paid out of the presence of me, notary, the receipt of which is hereby acknowledged with renunciation of the exception non numerata pecunia.

Thus done and passed at New Orleans, this fifteenth day of January, one thousand eight hundred and eighteen, in presence of George Pollock and Abner L. Dumas, who hereunto sign their names with the parties and me, notary.

(Original signed)

I. E. TRASK,
JOS. SAUL,
A. L. DUMAS,
GEORGE POLLOCK,
CARLISLE POLLOCK,
Notary Public.

I, the undersigned, custodian of notarial records for the parish and city of Orleans, State of Louisiana, hereby certify the foregoing to be a true copy of the original act passed on 15th day of January, 1818, before Carlisle Pollock, notary, deceased, which act is now in my possession.

New Orleans, June twenty-seventh, 1877.

J. F. COFFEY,
Custodian of Notarial Records.

Release by Saul of mortgage by Daniel Clark.—Filed July 14th, 1877.

Be it known that on the sixth day of December, in the year of our Lord one thousand eight hundred and twenty-five, and fiftieth of the Independence of the United States of America, before me, Hugh K. Gordon, notary public, in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and sworn, personally appeared Joseph Saul, proprietor, resident of this city, who declared that
56 whereas, by act passed before Carlisle Pollock, a notary in this city, dated the fifteenth day of January, eighteen hundred and eighteen, Israel E. Trask, for the consideration in said act mentioned, did assign, transfer and make over to him, the said Joseph Saul, a certain mortgage then held by said Trask, and which was originally granted by Daniel Clark, on a certain plantation and slaves, situated about five leagues above this city on the same side of the river, measuring twenty-four arpents front, and running back to the Lake Ponchartrain, bounded above by the property of Kenner, and below by the property of Fortier, to secure payment of the sum of forty thousand dollars, with interest thereon at the rate of six per centum per annum, by an act passed before the late John Lynd, notary, of this city, deceased, dated the sixteenth day of December, eighteen hundred and twelve, in favor of said Israel E. Trask and Stephen Henderson, the said Trask having purchased out the rights of said Henderson, assigned said mortgage to Winthrop Sargent, by an act under private signature, dated the 12th of March, 1814, who afterwards re-assigned to the said Israel E. Trask.

The said Joseph Saul further declared, that while he was owner of the said debt and mortgage, and some time in the year eighteen hundred and eighteen, he received from Omer Fortier and Jacques Fortier,

junior, full and entire payment of the said sum of forty thousand dollars and interest in full satisfaction and liquidation of the said debt and mortgage of the sixteenth December, 1812, (twelve;) but as its appears the same still exists on the records of the register of mortgages in this city.

Now, therefore, the said Joseph Saul declared that in consideration of the payment by him received as aforesaid, he does, by these presents, grant full and entire release, discharge and acquittance of the said mortgage of the sixteenth of December, 1812 (twelve), and hereby consents and requires that the same may be annulled on the records of the said register of mortgages.

Thus done and released at New Orleans aforesaid, in presence of Felix Brunel and Joseph Delagerry, witnesses, who hereunto subscribe their names, with the appearer and me, the notary.

(Original signed)

JOS. SAUL,
F. BRUNEL,
J. DELAGERRY,
H. K. GORDON,
Notary Public.

I, the undersigned, custodian of notarial records for the parish and city of Orleans, State of Louisiana, hereby certify the above to be a true copy of the original act passed before Hugh K. Gordon, notary, deceased, which act is dated 6th December, 1825, and is now in my possession.

New Orleans, June twenty-seventh, 1877.

J. F. COFFEY,
Custodian of Notarial Records.

57 *Partial release of mortgage by Henderson.—Filed July* 14, 1877.

Be it known that this day before me, John Lynd, notary public, in and for this city of New Orleans, personally appeared Stephen Henderson, of this city, who declared that he has received of and from Michel Fortier, jr., and others, proprietors of the plantation affected by this act, the sum of $13,333.33⅓, on account of a mortgage granted in his favour by Daniel Clark, to secure the payment of the sum of $80,000, by act passed before me, notary, 16th December, 1812, and consented that satisfaction of said mortgage to the amount so paid off may be entered upon the register of the conservator of mortgages for this State, leaving the said mortgage, however, in full force and vigour for so much as respects the amount yet unpaid.

Thus done and passed at New Orleans, this twenty-sixth of April, one thousand eight hundred and fifteen, in presence of George Pollock and F. L. Turner, witnesses, who hereunto sign their names with the appearer and me, notary.

(Original signed)

F. L. TURNER
GEORGE POLLOCK,
S. HENDERSON,
JOHN LYND,
Notary Public.

I, the undersigned custodian of notarial records for the parish of Orleans, certify the foregoing to be a true copy of the original act passed

before John Lynd, notary public, deceased, dated 26th April, 1815, and now in my possession.

New Orleans, July 10th, 1877.

J. F. COFFEY.
Custodian of Notarial Records.

Partial release of mortgage by Henderson.—Filed July 14th, 1877.

Be it known that this day, before me, John Lynd, notary public, in and for this city of New Orleans, personally appeared Stephen Henderson, of this city, merchant, who declares that he has received of and from Michel Fortier, jr., and others, the proprietors of the plantation affected by this act, the sum of $13,333.33⅓, on account of a mortgage granted in his favour by the late Daniel Clark, to secure the payment of the sum of $80,000, by act passed before me, notary, 16th December, 1812; and consented that satisfaction of the said mortgage to the account so paid off may be entered upon the register of the conservator of mortgages for this State, leaving the said mortgage, however, in full force and vigour for so much as represents the amount yet unpaid.

Thus done and passed at New Orleans, this thirteenth day of
58 March, one thousand eight hundred and sixteen, in the presence of George Pollock and Philip Guesnoix, witnesses, who hereunto sign their names with the parties and me, notary.

(Original signed)

PHILIP GUESNOIX,
GEORGE POLLOCK,
S. HENDERSON,
JOHN LYND,
Notary Public.

I, the undersigned custodian of notarial records for the parish of Orleans, certify the following to be a true copy of the original act, passed before John Lynd, notary, deceased, dated 13th March, 1816, now in my possession.

New Orleans, July 10th, 1877.

J. F. COFFEY,
Custodian of Notarial Record.

Partial release of mortgage by Henderson.—Filed July 14th, 1877.

Be it known, that this day before me, John Lynd, notary public in and for this city of New Orleans, personally appeared Stephen Henderson, of this city, merchant, who declared, that he has received of and from Richard Relf, executor of the late Daniel Clark, the sum of thirteen thousand three hundred and thirty-three one third dollars, on account of a mortgage granted in his favor by the late Daniel Clark to secure the payment of the sum of eighty thousand dollars, by act passed before me, notary, 16th December, 1812, and consented that satisfaction of the said mortgage to the amount so paid off may be entered upon the register of the conservator of mortgages for this State, leaving the said mortgage however in full force and vigor for so much as respects the amount yet unpaid.

Thus done and passed at New Orleans this fifteenth day of January, one thousand eight hundred and eighteen, in presence of John B. M.

Piver and Hu. K. Gordon, witnesses, who hereunto sign their names with the appearer and me, notary.

(Original signed)

JOHN B. M. PIVER,
HUGH K. GORDON,
S. HENDERSON,
JOHN GORDON,
Notary Public.

I, the undersigned, custodian of notarial records for the parish of Orleans, certify the foregoing to be a true copy of the original act passed before John Lynd, notary public, deceased, dated January 15, 1818, now in my possession.

New Orleans, July 10, 1877.

J. F. COFFEY,
Custodian of Notarial Records.

59 *Stipulation M.—Filed July 14th*, 1877.

U. S. circuit court.

MYRA C. GAINES
vs.
P. H. MONSSEAUX ET ALS. } No. 3663.

It is stipulated and agreed, to save unnecessary costs and delays, that the production in evidence of copies of notarial acts of purchase and transfer of the real estate claimed from the defendant, Widow Eliza Kenner, in her own right and as administratrix and tutrix, and as set forth in said defendant's pleas and answers, be dispensed with. The facts to be proved by the introduction of such acts not already in evidence having been sworn to by the said defendant in her pleas and answers, the statements under oath of the said defendant in her said pleas and answers are to be taken and received in lieu of said acts.

It is further agreed, in regard to the proof of possession, in order to save delay and expenses, that the said defendant, in her own right and as said administratrix and tutrix, and the said Minor Kenner, took public and unequivocal possession of said plantation under titles as owners, and which was continuous and uninterrupted by each vendee, back to, but not including the alleged sale by Thomas Beal, register of wills, on the 8th November, 1813, to Michel Fortier, jr., and Omer Fortier, as set forth in the copy of his process-verbal filed with defendant's answer on the 20th April, 1872, marked A and B, nor the alleged notarial act of sale by Richard Relf, executor to said Michel Fortier, jr., and Omer Fortier, before Marc Lafitte, notary public, on the 11th November, 1813, also annexed to the said defendant's answer, and marked C.

But it is admitted that said Omer and Michel Fortier entered into public possession of said plantation under and by virtue of said sale to them by said register of wills on November 8th, 1813, and the conveyance thereof, by said Relf, by act before Marc Lafitte, notary public, on November 11th, 1813, of which said exhibit C is a copy, and the said Omer Fortier and the said Michel Fortier until his death, and afterwards Jacques Fortier, his sole heir, maintained such possession continuously from said 8th November, 1813, until the 9th day of January, 1818, when they sold said plantation, as stated in defendant's answer.

But it is not admitted that the property was so sold by the said regis-

ter of wills on the 8th November, 1813, after due legal advertisement, or "après les publications et delais prescribe par la loi," as recited in the said notarial act of sale before Marc Lafitte, notary, of the 11th November, 1813, but, on the contrary, it is denied that such advertisement was made.

WM. REED MILLS,
Solicitor of Myra C. Gaines.

JULY 3d, 1877.

60 *Agreement.—Filed July* , 1877.

U. S. circuit court, district of Louisiana.

MYRA CLARK GAINES *versus* P. H. MONSSEAUX ET ALS. } No. 3663.

In the matter of complainant's action and claim herein against the defendant, Mrs. Eliza Davis, widow of Minor Kenner, and administratrix of his succession and tutrix of his minor children, it is agreed between parties, plaintiff and defendant:

1°. Though complainant claims that said defendant's pleas and answer by her filed on the 5th March, 1866, were heard and decided adversely to defendant by this court, in the opinion rendered and filed herein on the 15th day of June, 1871, and that the agreement, on file, of the 20th April, 1872, was entered into by solicitors in error, and further, that the evidence taken by Taylor and McConnell, as solicitors of various defendants, was intended to be offered in behalf of said defendant, Eliza Davis, in her own right and as administratrix and tutrix; and that said cause, as regards said particular defendant, was heard and determined with the causes against the other defendants, which is not admitted by the present solicitor, J. D. Rouse, yet complainant consents that said pleas and answer of the 5th March, 1866, be consolidated with as part of the answer filed on the 20th April, 1872, and be submitted for hearing to Judge Billings upon the following evidence:

(A). On part of complainant the evidence already offered and on file in said cause as against all the defendants.

(B). On part of said defendant, widow Minor Kenner, for self and as administratrix and tutrix.

(*a*). All the evidence submitted by the solicitors of any and all of the defendants in said clause, including stipulations, etc., or such part as the solicitor of widow Minor Kenner may select by July 15th, 1877.

(*b*). Complainant agrees to the following stipulations marked M of this date.

(*c*). Such further evidence as the defendant's solicitor may wish to offer by July 15th, 1877.

2°. And it is further agreed, that the evidence to be offered by the defendant under this agreement shall be filed by the 15th of July, 1877, and the case shall be submitted on brief in the month of November, 1877.

3°. It is further agreed, that the replication heretofore filed by complainant to defendant's original answer shall be considered as filed to the said answer as it now stands amended.

J. D. ROUSE,
Solicitor for Mrs. Kenner.
WM. REED MILLS,
Solicitor of Myra C. Gaines.

JULY 3d, 1877.

61 *Certificate annexed to copy of sale (ante p. 52).—Filed July* 14, 1877.

I, the undersigned, custodian of notarial records for the parish of Orleans, and as such in possession of the records and acts passed before John Lynd, late notary public for said parish of Orleans, do hereby certify that the foregoing act of sale of a certain plantation and slaves from Stephen Henderson to Daniel Clark, passed before said John Lynd, notary, on December the 16th, 1812, is not now in my possession as such custodian and never has been, and I do further certify that after due and diligent search and inquiry I have been unable to find said act of sale above described, and that I have no knowledge of its whereabouts.

New Orleans, July 14, 1877.

J. F. COFFEY,
Custodian of Notarial Records.

Memorandum of defendants' evidence.—Filed July 14, 1877.

U. S. circuit court, district of Louisiana.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX ET AL. } No. 3663.

The defendant, Mrs. Eliza Kenner, introduces in evidence in her behalf the following, viz.:

1. Exhibits A, B, C, and D, annexed to her answer and already filed herein.

2. Certified copy of inscription upon the records of the recorder of mortgages for the parish of Orleans, of act of sale by Stephen Henderson to Daniel Clark, and mortgage therein granted, by act before John Lynd, notary public, December 16, 1812.

3. Certificate of the custodian of notarial records for the parish of Orleans that said act before Lynd, of December 16, 1812, cannot be found in his office.

4. Copy of notarial act of release of mortgage by Stephen Henderson to Richard Relf, exr. Daniel Clark, before Lynd, notary public, January 16, 1818.

5. Copy of act of assignment by I. E. Trask to Joseph Saul, before Carlisle Pollock, notary public, January 15th, 1818.

5. Copy of release of the Trask mortgage by Jos. Saul, before Hugh K. Gordon, notary public, December 6th, 1825.

7. Copy of partial release of mortgage by Stephen Henderson, by act before John Lynd, notary public, April 26th, 1815.

8. Copy of partial release of mortgage by Stephen Henderson, by act before John Lynd, notary public, March 13th, 1816.

9. Partial release of mortgage by Stephen Henderson, by act before John Lynd, notary public, January 15th, 1818.

62 10. The stipulation M entered into by said complainant in this case, dated July 3d, 1877.

11. The following portion of the probate record heretofore offered in evidence in this suit, viz:

a. Will of Daniel Clark, dated May 20, 1811, and the proof thereof.

b. Petition of Richard Relf, executor, to remove seals and make inventory, etc., and the order thereon.

c. Extract from the inventory of D. Clark's succession, embracing, de l'habitation des Chapitoulas (or Cannes Brulées).

d. Petition of Richard Relf for letters testamentary and order granting same.

e. Oath of R. Relf, testamentary executor.

f. Letters testamentary to Richard Relf.

g. Account of administration by executors, so far as it relates to Cannes Brulées' estate.

And whereas, the evidence offered by said defendant being wholly documentary, it is agreed that the services and report of an examiner shall be dispensed with and the evidence filed in the suit as a part of the record of the same. And the complainant waives all objection to the form of authentication of said evidence, reserving the right to move to suppress the same for matter of substance.

J. D ROUSE,
Solicitor for Mrs. Kenner.
WM. REED MILLS,
Solicitor for Myra C. Gaines.

63 COMPLAINANT'S LIST OF EVIDENCE.

U. S. circuit court, fifth circuit and district of Louisiana.

MYRA CLARK GAINES
versus
P. H. MONSSEAUX ET ALS. } No. 3663.

As to the defendant Widow Minor Kenner, administratrix—evidence on behalf of the complainant.

I. The will and probate of the will of 1813, in the case of the City of New Orleans—N. O. printed record, vol. 1, commencing on the top of page 7, and ending with "P. S. Wiltz, Clerk," on page 9, being the record in the suit of Myra Clark Gaines vs. City of New Orleans et al., No. 2695 of the docket of this court, printed for the use of the Supreme Court of the United States, No. 345 of the original docket of that court, and when hereafter referred to, to be designated the "New Orleans Printed Record," for greater certainty.

II. The mandates of the Supreme Court of the United States in the case of Myra Clark Gaines vs. D. N. Hennon, as found in 24th Howard U. S. Reports, p. 617, and in the case of Myra Clark Gaines vs. City of New Orleans et al., as found in 6th Wallace U. S. Reports, p. 17.

III. The judgment of the United States circuit court, signed 30th April, 1877, in the case of Joseph Fuentes et al. vs. Myra Clark Gaines, No. 8038 of the docket of said court.

IV. The original bill in suit, No. 122 of the docket of this court, brought by Wm. Wallace Whitney and Myra Clark Whitney, his wife, against various defendants, and the filing thereof, as found in "The New Orleans Printed Record," vol. 2d, pp. 125, ending on the bottom of page with "filed July 28th, 1836."

V. The filing of the mandate of the Supreme Court of the United States in the case of Gaines vs. Relf, Chew, et als., No. 122, filed in the circuit court 3 January. 1853, delivered at December term of the Supreme Court, in the words above quoted, and as found near the top of p. 361 of "The New Orleans Printed Record," vol. 1.

VI. The bill of complainant, with schedule A annexed, entitled E. P. Gaines and Myra Clark Gaines, his wife, vs. Relf & Chew, No. 1765 of

the docket of this court, with the filing thereof, as found in vol. 1st of the New orleans printed record, pp. 681 to the bottom of p. 713.

VII. The probate record of the succession of Daniel Clark, and especially the probate of the will of 1813, not including the testimony therein, except as hereinafter specially offered.

VIII. The entry at January rules of 1849, in suit No. 122, as found in the printed record of suit No. 122, Joudat et als.

IX. The entry at rules of 19th of April, 1841, taking the bill in suit No. 122 pro confesso as to John Halliday et als., in the printed record No. 122, p. 141.

X. The agreement as to the testimony of Myra Clark Gaines, marked X, of this record.

64 XI. The record in the suit of Myra Clark Gaines vs. Minor Kenner et als., No. 46, of the district court of the Confederate States.

XII. The will of Daniel Clarke, made July 13th, 1813, probated by the supreme court of Louisiana in 1855.

XIII. Taking bill pro confesso, N. O. edition of suit No. 122, pp. 166, 167, and 179.

XIV. Petition of François D'la Croix, and affidavit attached. Probate record, pp. 10 and 11.

XV. Testimony under commission of Perin Baron Boisfontaine, taken on the 28th May, 1835. Probate record, pp. 145 to 154.

XVI. Testimony of Sophia Despaux, Lizardi printed record, vol. 2, pp. 604 to 608—16th October, 1845.

XVII. Testimony under commission of J. D. D. Bellechasse. Probate record, pp. 151 to 165.

XVIII. Appearance for demurrer of Mrs. Maria Halliday et als., of 12th April, 1841. Printed record of Gaines vs. Lizardi, vol. 1, p. 349.

XIX. Appearance on demurrer of Halliday et als. New Orleans record, vol. 1, pp. 344 to 348.

XX. Entry at rules 17th May, 1845, taking bill pro confesso. Record 122, city edition, p. 175. Entry at rules 19th April, 1841, taking judgment pro confesso against Halliday et als. Record 122, same edition, pp. 166 and 167.

XXI. Statement of J. W. Gurley as to Confederate States court for district of Louisiana, etc., of 13th April, 1878, marked W.

XXII. Affidavit of Wm. Reed Mills as to loss of the record of Myra Clark Gaines vs. Minor Kenner, No. 49 of the Confederate States court for the district of Louisiana, marked Y.

WM. REED MILLS.

W.—*Statement of J. W. Gurley.*

NEW ORLEANS, 13 *April*, 1878.

J. W. Gurley, being sworn, says that he was the duly appointed clerk of the district court of the Confederate States for the district of Louisiana, holding sessions in the city of New Orleans, from the time of its organization, in , until the capture of the said city by the forces of the United States. That E. Warren Moise was the judge of the said court, and C. B. Beverley was the marshal of the Confederate States for the said district of Louisiana. That the said court was fully organized. That it held daily sessions in the said city of New Orleans. That the authority of the court, within the limits of its jurisdiction, was absolute and undisputed, and its mandates and orders universally obeyed. Suits were almost daily instituted, and the writs and processes of the court were

enforced and respected. That a large number of suits were instituted in the said court by Myra Clark Gaines, as plaintiff, against various persons, claiming property alleged to have belonged to Daniel Clark at the time of his death. These petitions were in print, with blank spaces wherein were inserted the names of the defendants, description of the property
65 claimed, &c. The petition now exhibited to me, endorsed, "169. C. S. district court. M. C. Gaines vs. H. H. Heron. (Bonford & Perin.) Filed 17th January, 1862. J. W. Gurley, cl'k," is one of the petitions alluded to. In the printed portion they were all alike. The signature purporting to mine, on the petition just alluded to, is genuine. I have examined my fee book as clerk of the said court, and which is now in the clerk's office of the U. S. circuit court, in this city. I find there docketed, in my handwriting, the following case:

F. Perrin.

MYRA CLARK GAINES *vs.* MINOR KENNER. } 46.

Durant & Hornor.
Security for costs, P. B. Boisfontaine.

Law.

1861.		
Dec. 30.	Filing petition	10
	Iss'g copy S. & C	1.50
	Iss'g citation, M. P	1.00
1862.		
Feb'y 1.	Filing exception	10

This is one of the many Gaines cases above spoken on. No entry of pleadings or other papers were ever made until they were actually filed.

J. W. GURLEY.

Jurat waived.

J. D. ROUSE,
Solicitor for Mrs. E. Kenner.

Y.—*Referred to in list of evidence, numbered XXII.*

U. S. circuit court, district of Louisiana.

MYRA CLARK GAINES *versus* P. H. MONSSEAUX ET ALS. } No. 3663.

In this suit against the defendant, Mrs. Eliza Kenner, Wm. Reed Mills, first being duly sworn, says that heretofore he offered in evidence in this court the record of a certain suit, numbered and entitled Myra C. Gaines vs. Minor Kenner, No. 46 of the Confederate States court for the district of Louisiana, similar so far as the petition is concerned to the annexed petition of Myra C. Gaines vs. H. H. Heron, No. 169; to which petition an exception was filed by the said defendant, excepting that said petition set forth the properties now in complainant's bill claimed from said defendant in the cause at bar, and said exception recognized cization.

Affiant further says that said record, though offered by complainant's solicitor in evidence in this court in the above entitled cause is,
66 with the exception of bond for costs herewith filed and marked K, not now to be found, notwithstanding due and protracted search made therefor.

WM. REED MILLS.

18th April, 1878.

Jurat waived.

J. D. ROUSE,
Sol. for Mrs. Kenner.

X.—*Referred to in list of evidence, numbered X.*

It is admitted that complainant if present, would swear that the allegations set forth in her bill of complaint in this cause, so far as the same are therein stated and set forth as from her personal knowledge, are each and all severally true, and that so far as the same are stated from knowledge derived from others, she believes the same to be true. That the allegation as to the date of her birth, is from information derived from her mother. And it is agreed that this admitted statement shall form part of complainant's testimony.

J. D. ROUSE,
Sol. for Mrs. Kenner.

67 *Original bill in suit No. 122 of the docket of this court, brought by W. W. Whitney and Myra C. Gaines, his wife, against various defendants, and the filing thereof, &c.*

In equity, before the Hon. Sam'l H. Harper.

To the honorable the district court of the United States for the eastern district of Louisiana:

Humbly complaining, your orator and oratrix, William Wallace Whitney and Myra Clark Whitney, his wife, citizens of the State of New York, show unto this honorable court that Daniel Clark, late of the city of New Orleans, in the State of Louisiana, and father of your oratrix, the said Myra, was, at the time of making his last will hereinafter mentioned, and at his death, seized in fee simple or otherwise, well entitled to and lawfully possessed of, in the said eastern district of Louisiana, divers freehold messuages, plantations, lands, tenements, hereditaments, and premises, and particularly the of plantations, lands and premises thereinafter enumerated, and situate, bound and described as follows, that is to say:

1st. One valuable plantation, parcel or tract of land situated in the parish of in the first district in the State of Louisiana, about five leagues above the city of New Orleans, on the left bank of the Mississippi River, and bounded on the upper side by lands owned or possessed, in the month of October, 1813, by one William Kenner, and on the lower side by lands which were owned and possessed, in said October, 1813, by Jacques Fortier; and extending in front on the said river Mississippi twenty-four and one half arpents; and extending in depth, on both sides, to Lake Ponchartrain, with all the buildings, tenements, hereditaments and appurtenances hereunto belonging, or are in any wise appertaining, being the same plantation, piece or parcel of land which

was purchased by the said Daniel Clark, in his lifetime, of one Stephen Henderson, for the sum of one hundred and twenty thousand dollars.

68 2d. A tract, portion or square of land situated in the suburb St. Mary, of the city of New Orleans, being the square of ground in said suburb bounded on one side by Phillippa street, on the second side by Poydras street, on the third side by Circus street, and on the fourth side by Perdido street, and measuring, on Phillippa street, three hundred and eighteen feet, more or less; on Poydras street, one hundred and seventy-nine feet and six inches, more or less; on Circus street, three hundred and forty-six feet, more or less; and on Perdido street, two hundred and eleven feet six inches, be the same more or less, together with all the tenements and appurtenances thereunto belonging, or in anywise appertaining.

3d. A piece, parcel or tract of land, with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging, situate in the parish of New Orleans, on the right-hand side of the Gentilly road, on going toward Gentilly from the city of New Orleans, and in the neighborhood of said Gentilly, and being about twenty-two arpents in front on said Gentilly road, and possessing depth and extending back from said road, according to a plan of said piece, parcel or tract of land deposited in the office of Savinier Blanc, notary public in and for the parish and city of New Orleans, by Richard Relf and Beverly Chew, by act dated 27th day of December, 1820.

4th. A piece or parcel of land, with the buildings, tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, situate in the city of New Orleans, and being known and distinguished as lots number one hundred and eighty-four and one hundred and eighty-six, in Royal street in said city, being the same lot of land and buildings which were sold and convened, together with other property, to said Daniel Clark, by James Pitot, by act of sale before Peter Pedesclaux, notary public, on the 24th day of February, 1813, measuring thirty feet in front on said Royal street, and one hundred and twenty feet in depth, and bounded on one side by property which, in the said month of February, 1813, was owned or possessed by Madame Widow Lanties, and on the other side by property which, in said month of February, was owned by Messrs. Grandchamp and Monnier.

5th. Three lots of land adjoining together, and forming but one piece or parcel of land, and each lot being about sixty feet front and one hundred and twenty feet deep, and situated on the southerly corner formed by the intersection of Toulouse and Burgundy streets, of the square of ground in the said city of New Orleans which is bounded and enclosed on one side by the said Toulouse street, on the second side by Rampart street, on the third side by St. Peter street, and on the
69 fourth side by said Burgundy street, together with all the tenements, hereditaments thereunto belonging or in anywise appertaining; the said three lots of land which form together, as aforesaid, but one piece or parcel of land, being the same that were sold and conveyed, together with other property, to said Daniel Clark by the aforesaid James Pitot, by act of sale passed before Pierre Pedesclaux, on February 24th, 1813, and are known and designated on a map, or plan, of the square, formerly the old burying ground, and included, as aforesaid, between Toulouse, Rampart, St. Peter and Burgundy streets, drawn by Carlos Trudeau, dated June 11th, 1801, and deposited in the office of P. Pedesclaux, notary public, as lots Nos. 1, 2 and 12, said No. 1 forming the said corner of Toulouse and Burgundy streets, and meas-

uring sixty feet four inches in front on Burgundy street and 120 feet deep.

6th. A piece, parcel, or tract of land situated on the quarter of the Bayou St. John, in the parish of New Orleans, containing about one hundred and thirty-five arpents, and adjoining the road of the Canal Carondelet and the land of E. Couchieux, running thence along Broad street to Bellechasse street, of the Fauxbourg St. John, and land which, in the month of October, 1821, was owned or possessed by Mrs. Herry, thence to the land of Evariste Blanc, and to the Bayou St. John, in conformity with a plan drawn by Joseph Pilie, dated August 20th, 1821, and annexed to an act of sale of said tract made by Richard Relf and Beverly Chew to Evariste Blanc, and passed before Phillip Pedesclaux on the 30th day of October, 1821, together with all the buildings, tenements, hereditaments, and appurtenances, thereunto belonging, or in anywise appertaining.

7th. A lot of land, with the buildings, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, situated in the suburb St. John, at about half a league fro n the city of New Orleans, being known and distinguished, on a plan of the said suburb made by B. Lafon, dated the 15th day of June, 1809, and deposited in the office of P. Pedesclaux, notary of the said city of New Orleans, as lot No. 3, in the square 23, of the said suburb St. John, being sixty feet in front on Washington street, and about one hundred and twenty feet deep.

8th. Eight lots of land, from No. 1 to 8, both inclusive, forming the square No. 28, of the suburb of St. John, in the said city and parish of New Orleans, as the same are laid down and described on the beforementioned plan of the suburb St. John, made by B. Lafon, together with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging, or anywise appertaining.

70 9th. A lot of land situated in the said suburb St. John, in the square designated in the above-mentioned plan, made by B. Lafon, as the square No. 35, being one hundred and nine'-two feet in front on Washington street, and sixty-four feet deep, and forming a corner of said square of No. 35, together with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining.

10th. A piece, parcel, tract, or square of land in the said suburb St. John, and known and distinguished on the said plan, made by said B. Lafon, as the square number four in the said suburb St. John, and measuring two hundred feet in front on said Washington street, three hundred feet in front on St. John street, one hundred and thirty feet front on Broad street, and eighty feet front on place Le Breton, together with all the buildings, tenements, hereditaments, and appertenances thereunto belonging, or in anywise appertaining.

11th. A plantation, or tract of land, situated on the right bank of the Bayou Lafourche, opposite the town of Donaldsonville, and measuring eleven arpents in front on the Mississippi and twenty-nine arpents on the said Bayou Lafourche, be the same more or less, being the same tract or parcel of land which, during the life of the said Daniel Clark, was purchased and held by Wade Hampton for the said Daniel Clark, and conveyed in February, 1818, by act passed before Charles D ,
judge of the parish of Ascension, by said Hampton, after the death of said Daniel Clark, to Richard Relf, one of the defendants hereinafter named, who assumed to receive such conveyance as pretended executor

of said Daniel Clark, and who subsequently conveyed the said tract or parcel of land to one Bartholemy Lafon.

12th. A tract of land, purchased by Daniel Clark of William Simpson, by act passed before P. Pedesclaux, notary public of the city of New Orleans, on the 5th day of June, 1812, and which is situated in the parish of Ascension and county of Acadia, on the left bank of the river Mississippi, measuring in front, on the said Mississippi River, eighteen and one-half arpents and extending back from said river Mississippi in depth forty arpents, and bounded on the lower side by land which was owned in 1816 by Beverly Chew and Richard Relf, and on the upper side by land which was sold and conveyed in said year 1816 by Beverly Chew and Richard Relf to Stephen Henderson and G. N. Destrehan.

13th. A lot, piece, or parcel of land in the city of New Orleans, in the square bounded by Delord street, Tivoli Place, St. Charles street, St. Joseph, and Camp street, being the lot on the southeasterly cor-
71 nor of said square, which corner is formed by the intersection of the said Camp street and Delord street, in the suburb St. Mary, of the city of New Orleans, and measuring sixty feet, French measure, on Camp street, and one hundred and twenty feet, French measure, on Delord street.

14th. The equal undivided half part of a tract of land situated at at Manchac, on the east bank of the river Mississippi, and bounded on the upper side by lands which, in the year 1815, were owned or possessed by the widow Harson, and on the lower side by lands reserved by the Spanish Government for the fort, with all the depth that is expressed or conveyed to the said Daniel Clark, in an act passed before Peter Pedesclaux, of New Orleans, notary public, dated June 23d, 1806, with all the rights, profits, commodities, servitudes, and appurtenances to the same belonging, or in anywise appertaining, being the same that the said Daniel Clark sold and conveyed in his lifetime to Celestine St. M by act passed before John Lynd, notary public, on March 6th, 1811, which act of sale was afterwards, to wit, on the 28th day of May, 1814, rescinded by sentence of the district court of the then third district of Louisiana.

15th. A piece, parcel, or tract of land situated near Duval's plain, about two leagues from the town of Baton Rouge, in Louisiana, containing five hundred arpents, be the same more or less, being the same tract which said Daniel Clark acquired by purchase of Charles Fessin, by an act before the parish judge of the parish of Baton Rouge, in the State of Louisiana.

16th. A tract of land containing fourteen thousand and forty-seven arpents, be the same more or less, situated on the east side of the river Comite, nine miles from its confluence with the river Amite, and bounded in the year 1819, on the north by lands belonging to the said Daniel Clark, on the south by lands granted to Sophia, Josepha, and Rosalina Grandpre, on the east by public land, and on the west by the river Comite, as appears by a certificate and plan or map of survey executed by Don Vincent Sebastien Pintado, and dated October 13th, 1803, and number 1649.

17th. A tract of land containing twelve hundred and forty-eight arpents, situated in the district of East Baton Rouge, in the said eastern district of Louisiana, six and one-quarter miles east of the river Mississippi, and ten miles north quarter, northeast of the fort of Baton Rouge, and bounded, in 1819, north and east by public lands, on the south by land granted to John F , and on the west by lands of

the late John Bretillier and late John Posset, as appears by a
72 certificate and plan of survey executed by said V. S. Pintado, dated October 9th, 1803, and number 1644.

18th. A tract of land containing four thousand three hundred and sixty-four arpents, situated in the district of Baton Rouge, in the said eastern district of Louisiana, on the west side of Sandy Creek, nineteen miles south of the line of demarkation, and bounded, in 1819, on the north and west by public lands, on the south by lands granted to Carlos, and on the east by said creek, as appears by a plan and certificate executed by V. S. Pintado, dated December 23d, 1803, number 1698.

19th. A tract of land containing three thousand eight hundred and sixty-four arpents, situated in the eastern district of Louisiana, on the west side of the river Comite, and fronting thereon, three and one-third miles above Redwood Creek, and bounded, in 1819, on the north by vacant lands, on the south by lands granted J. B. Labitut, on the east by the said river Comite, and on the west by land belonging to the estate of Daniel Clark, as appears by a plan and certificate of survey, number 1699.

20th. A tract of land containing two thousand five hundred arpents, situated in the said eastern district of Louisiana, at the head of Jones Creek, six and one-quarter miles east quarter, northeast from the fort of Baton Rouge, and bounded, in 1819, on the north and east by vacant lands, on the south by lands belonging to the said Daniel Clark, as appears by certificate 1700.

21st. A tract of land containing two thousand arpents, situated in the eastern district of Louisiana, nine and one-quarter miles east quarter southeast from the fort of Baton Rouge, and bounded, in 1819, on the north by land of the said Daniel Clark, and on the south, east, and west by vacant lands, as appears by a plan or map and certificate of survey, number 1700.

22d. A tract of land containing twenty-one thousand nine hundred and twenty-one arpents, being an undivided part of three tracts containing fifty-two thousand arpents, situated on the east side of the river Amite, in the said eastern district of Louisiana, the lower line being about eight miles above its confluence with the river Comite, and bounded, in 1819, on the north by land granted to Jerome Lachappelli, on the south by land granted to G. M. Morgan, on the east by vacant lands, and on the west by the river Amite, as appears by the plan or map and certificate of survey of Charles Trudeau, number 1721, and dated April 17th, 1804.

23d. The equal undivided half part of a tract of land or plantation
73 situated in the parish of St. John the Baptist, at about twelve leagues from the city of New Orleans, having about ten arpents in front on the river Mississippi and forty in depth, and bounded, in 1814, on one side by lands owned or possessed by Cambre, and on the other by lands owned or possessed by the widow of James Deslondes.

24th. The equal undivided half part of a plantation or tract of land in the said parish of St. John the Baptist, being about four and one-half arpents in front on the Mississippi River, and bounded, in 1814, on one side by lands owned or possessed by Henry Mores, and on the other by lands owned or possessed by Fife Mores.

25th. A tract of land situated on the left bank of the Bayou Lafourche, in the said eastern district of Louisiana, being about six arpents in front on the said bayou, and bounded in 1819 on both sides by lands owned or possessed by Louis Haitier.

26th. A tract of land containing five thousand four hundred and

seventy arpents, situated in the said eastern district of Louisiana, on the eastern side of the river Comite, at or about twelve and three-quarter miles from the line that separated the king of Spain's dominions from the American territory, and bounded, in 1813, by the lands surveyed for Don Manuel Pareia and Juan de Lassize, on the south by lands surveyed for Don Cristoval DeArmas, east by the said river Comite, and on the west by vacant lands.

And your orator and oratrix also show unto this honorable court that the said Daniel Clark, at the time of making his said last will, and at his death, was also possessed of as owner interested in or otherwise well entitled to a large number of slaves and a considerable personal estate, and particularly to the slaves and personal estate hereinafter enumerated and described, that is to say:

1st. Two hundred and twenty-six slaves, severally named, Will, Lubin, Coke, Solomon, Jacob, John, Jacques. Argen, Jacob, Antoine, David, George, Paul, Adam, Doctor, David, Randolph, Etienne, Lubin, Ref, Providence, Lindor, Figuro, Nacisse, Nede, Isaac, Jean, Solomon, Austine, Jones, Gibaud, Wallis, Charles, Jacques, Cordio, Davi, Cardinal, Jerome, L'Ebene, John, Merode, Willis, Moise, Davis, Andre, Dress, Andre, Thomfield, Bobe, Alce, James, Harry, Storder, Arthur, Ledger, Sam, Phœbe, Fanny, Anna, Genevieve, Betty, Polly, with her two children, one named John, and the other suckling, Liza, with her child William, a doctor Negro, Hector, William, Janvier, Stewart, Jim, Kersay, Manvier, Kett, Brown, John, Winy, with her child David, Old
Esther, Billy, Hannah, James McCall, Phille, Betsy, with her
74 child Monthson, Easther Morning, Sam, Old Lett, Grace, Elijah,
James, Rose, Hannah, Bird, Patty, Lawrence, Franky, John, Charles, McKensy, Margaret, Fanny, with her child Marie, Nelson, Major, Nanny, with three children, Hellick, Banky, and Maroja, Spender, Thenier, Old Major, Darkey, Dorianna, Smith, Cambridge, Rachel, with her child Gabriella, L'Wenny, Sarah, Judich, Polly, Fanny, Mace, Molly, Nancy, Kevy, Jane, Nancy, Washington, Betty, with her child Tom, Betty, George, Old Rachel, Dinah, Dam, Levy, Anthony, Rachel, Charlotte, Waldrin, Patience, Sukey, Lidley, Mamy, Sukey, Edmond, Nailey, Betty, Ben, Jenny, Kitly, Henrietta, Bob, Elsey, Betty, Peggy, Hartas, Thomas, Sally, Retti, Anny, William, Ben, Anny, Rasly, Jinny, Jones, Peter, Jackal, Jack, Mary, Joe, Sukey, Victoire, Joe, Rachal, Peggy, James, Harris, Rachal, George, James, Campaigne, Rose, Aime, Thom, Zazo, Mary, Duke, Chloe, James, Mary, Kelly, Darkey, Daniel, Louis, Sally, Luke, George, Job, Peggy, Jack, Nathan, Toby, Geoffry, Phil, David, David, James, Sheeling, Lucy, Morrow, George, Rose, Rosetta, Hannah, Judick, Kelly, Silva, Ketty, Julia, with her three children, named John, Quacks, and Jenny, Louisa, Little Jim, Jerry, Jobby, Jeffry, Nancy, Dinah, with her child James, Charlotte, Kitty, Peggy, with her child Jerry, Arthur, Sally, Rady, Rachal, Rachal, as the said two hundred and twenty-six slaves are enumerated and described in a document purporting to be an inventory of the said Daniel Clark's succession, deposited in the probate court in and for the parish and city of New Orleans.

2d. Cows, oxen, mules, and other animals, furniture, and other articles of domestic use, books, shrubs, and flowers, used and possessed, during his lifetime, by the said Daniel Clark, at or immediately in the vicinity of his dwelling or domicil in the suburb St. John, of the city of New Orleans, and which were of the value of four thousand and forty-four dollars, and upwards. And also certain other furniture, articles of domestic use, gardening tools, implements of husbandry, horses, oxen, mules, and other animals, of the value of three thousand eight hundred

and seventy three dollars and upwards, which were owned and employed by the said Daniel Clark, during his lifetime, upon the said plantation hereinbefore described as purchased by him from Stephen Henderson, and also certain debts and demands against several individuals, and (amongst others) the following:

1st. A debt of sixteen thousand dollars due to the said Daniel Clark by Zenon Cavalier and Louis de Feriet, and secured by mortgage, being the purchase money of a plantation, situate on the road of the Metarie, at the distance of one league and a half from New Orleans, sold
75 to said Cavalier and de Feriet by said Daniel Clark, by act before Peter Pedesclaux, dated January 20th, 1812.

2d. A debt of fifteen hundred dollars and upwards, due from David Porter to the said Daniel Clark.

3d. A debt of ten thousand dollars, and upwards, secured by mortgage, and due to the said Daniel Clark from David Urquhart, David Williams and James Williams, for a tract of land sold to them by the said Daniel Clark, by act passed before Peter Pedesclaux, on the 15th day of March, 1812.

4th. Certain debts, amounting in all, as nearly as your orator and orators are able to calculate the same, to the sum of eighty-five thousand four hundred and thirty-eight dollars and forty-one cents, as the same are specified in the document hereinbefore referred to, as purporting to be an inventory of the estate of the said Daniel Clark, and to which document your orator and oratrix, for greater certainty, here crave leave to refer, whenever and as often as it may be necessary for them to do so.

And your orator and oratrix also show, that the said Daniel Clark, at the time of making his last will, hereinafter mentioned, and at his death, was entitled, amongst other property, to certain property, debts and demands, which are enumerated in a schedule of debts and property, made and filed by Richard Relf and Beverly Chew, in the probate court for the parish and city of New Orleans, on the 3d day of March, 1814, the whole amount of the said schedule of debts and property being, as near as your orator and oratrix have been able to calculate the same, three hundred and twenty-three thousand one hundred and eighty-eight dollars and four cents, independently and exclusively of certain real estate, belonging to the said Daniel Clark, specified and set down in said schedule, at the value of three hundred and forty-four thousand dollars; and your orator and oratrix expressly charge, that all, or nearly all, of the said amount of three hundred and twenty-three thousand one hundred and twenty-eight dollars and four cents was belonging to, and the property of, the said Daniel Clark at the time of his, the said Daniel Clark's, death.

And your orator and oratrix further show unto this honorable court, and expressly charge, that previous to the death of the said Daniel Clark, it had long been the intention and earnest desire of the said Daniel Clark, the father of your oratrix, to leave at his decease, all his property and estate, real and personal, to your oratrix, the said Myra Clark Whitney; that, in order more effectually to secure the fulfilment of said intention and desire, the said Daniel Clark did, in or about the month of July, in the year 1813, duly make and execute his last will and tes-
76 tament, according to law, having wholly written and signed the same with his own hand, and did, in and by the said will, declare your oratrix, the said Myra Clark Whitney, to be his legitimate child, and the said Daniel Clark did also, in and by his said last will, devise and bequeath to your oratrix, the said Myra Clark Whitney, all his, the said Daniel Clark's, property and estate, real and personal, and

did name therein, as the executors of the said will, Colonel Joseph Deville Degontin Bellechasse, James Pitot, and Chevalier Dusnau de la Croix, appointing the said Chevalier de la Croix tutor, also, of your oratrix, the said Myra Clark Whitney, your oratrix being then an infant, under the age of twenty-one years, to wit, of the age of seven years.

And your orator and oratrix further show unto this honorable court, that the said will did also contain some bequests to friends, amongst which bequests were a legacy or annuity of two thousand dollars per annum, to be paid to Mary Clark, the mother of the said Daniel Clark, during the lifetime of said Mary Clark; an annuity of five hundred dollars, to be paid yearly, to one Caroline DeGrange, until the said Caroline should have obtained her majority, when the annuity should cease, and the sum of dollars should be paid to her; and also, a bequest of thousand dollars, to be paid to the son of the said James Pitot; and the said will further contained specific and detailed instructions respecting the education of your oratrix, the said Myra, and the management of the estate and property of the said Daniel Clark, during the infancy of your oratrix.

And your orator and oratrix further show unto this honorable court, and expressly charge that the said will was wholly written and signed with the proper hand of the said Daniel Clark; that the said will was shown, by the said Daniel Clark, to, and its contents read by, the said Judge James Pitot, the late John Lynd, notary public in and for the parish and city of New Orleans, Mrs. Harriet Smith and others; and that the said will was also shown, and its contents communicated, by the said Daniel Clark, to the said Colonel Bellechasse, Chevalier de la Croix, Mr. Pierre Baron Boisfontaine, and others, and that the said Daniel Clark departed this life on or about the 16th day of August, in the year 1813, without altering or revoking his said will, and leaving your oratrix, the said Myra Clark Whitney, his only child or descendant, and the forced or instituted heiress of all his property and estates, real and personal.

And your orator and oratrix further show unto this honorable court, and expressly charge, that the said Daniel Clark left, at his de-
77 cease, no child or descendant surviving him, except your oratrix, the said Myra Clark Whitney, and that your oratrix, the said Myra Clark Whitney, was and is the lawful and legitimate and only child or descendant of the said Daniel Clark, and entitled as such by the law of the land to the possession and inheritance of all the property and estate of the said Daniel Clark, and especially to the property and estate, real and personal, hereinbefore enumerated and described.

And your orator and oratrix further show unto this honorable court, and especially charge, that your oratrix, the said Myra Clark Whitney, soon after her birth, which took place in the month of July, 1806, was placed by her father, the said Daniel Clark, in the family of Samuel B. Davis, with whom she continued to live, at New Orleans, until the year 1812, when the said Samuel B. Davis removed, to live, to the city of Philadelphia, in the State of Pennsylvania; that your oratrix, the said Myra, accompanied the family of the said Samuel B. Davis to Philadelphia, and remained in his, the said Samuel B. Davis' family, until the time of the death of the said Daniel Clark, and afterwards; and that during the lifetime of the said Daniel Clark, he, the said Daniel Clark, continued to exercise the authority, care, and protection of a parent in regard to your oratrix, the said Myra Clark Whitney.

And your orator and oratrix further show unto this honorable court, that in or about the month of May, in the year 1811, the said Daniel

Clark was led to believe that one Daniel W. Coxe, of Philadelphia, with whom he had previously had some connection in business, had, by imprudence or misconduct, involved him, the said Daniel Clark, in some serious pecuniary and commercial difficulties and embarrassments; that immediately thereupon, the said Daniel Clark deemed it advisable to proceed forthwith to Philadelphia, in order to attend personally to the settlement of the difficulties which it was represented to him existed; that, preparatory to his undertaking the voyage from New Orleans to Philadelphia, for the purpose aforesaid, and in or about the month of May, 1811, he, the said Daniel Clark, conveyed property to Samuel B. Davis and others, to the amount of several hundred thousand dollars, to be held in trust by them for your oratrix, and then, at or about the same time, there made a will, devising briefly, and in general terms, his property to his mother, Mary Clark, then residing out of the State of Louisiana, and also appointing Richard Relf and Beverly Chew, two of the defendants herein, the executors thereof.

And your orator and oratrix further show that the said Daniel Clark, in or about the said month of July, 1811, proceeded to Philadelphia, and returned again in a few months thereafter, and in the same year, to New Orleans; that the said Daniel Clark had ascertained, at
78 Philadelphia, upon his having proceeded thither, as aforesaid, that his interests had not been so seriously jeopardized by the said Daniel W. Coxe as he had been led to believe, as above stated, previous to his having gone there; that he did, therefore, upon his said return to New Orleans, receive back some portions of the property which he had conveyed, as aforesaid, in trust for your oratrix, the said Myra, which under the above mentioned erroneous belief respecting the supposed difficulties in which the said Coxe was alleged to have involved him; and that upon his said return to New Orleans, and upon his having ascertained, as aforesaid, the groundlessness of the apprehension which had been excited in his mind relative to the consequences that might result to himself from the transactions of the said Daniel W. Coxe, he, the said Daniel Clark, did also declare that he no longer intended that the said will, made in 1811, should be his last will; that he had made it while laboring under false impressions, and only provisionally, and he should revoke the said will of 1811, and make and execute another will, devising and bequeathing all his estate, real and personal, to your oratrix, the said Myra Clark Whitney. And your orator and oratrix show unto this honorable court, and expressly charge, that the said Daniel Clark did revoke the said will, made in 1811, as aforesaid, and did, after the making and execution of the said will of 1811, duly make and execute, in the year 1813, and but a short time before his death, as your orator and oratrix have hereinbefore set forth, his, the said Daniel Clark's, last will and testament, devising and bequeathing thereby to your oratrix, the said Myra Clark Whitney, all of the real and personal estate of him, the said Daniel Clark, and declaring your oratrix, the said Myra, to be the legitimate child of him, the said Daniel Clark, as your orator and oratrix have hereinbefore more particularly stated; and that the said Daniel Clark did, upon his death bed, and unto the very moment of his decease, continue to declare that the aforesaid will, made by him in the year 1813, devising all his property, as aforesaid, to your oratrix, the said Myra, was his last will and testament, and was then contained in a black case in his office room, in the house in which he was at the time, and in which he died almost at the moment of making the said declarations in favor of your oratrix, the said Myra.

And your orator and oratrix further show unto this honorable court, that the said Daniel Clark, upon making the said will of 1811, delivered it to the said Richard Relf and Beverly Chew, or one of them, and allowed it to remain in their keeping from thenceforth; that the said Daniel Clark was very extensively engaged in mercantile and other business and speculations, and possessed a vast amount of property,
79 and that the said Richard Relf acted as his agent in relation to many of the transactions and affairs in which he, the said Daniel Clark, was engaged; that at and immediately before the time of the death of the said Daniel Clark, the said Richard Relf assumed to direct the domestic arrangements of the said Daniel Clark, and attended, during the last illness of the said Daniel Clark, at his, the said Daniel Clark's dwelling-house, and took upon himself the sole control of the household and the affairs of the said Daniel Clark, and that instantly, upon the death of the said Daniel Clark, all the books, papers, letters, documents, and all the deeds and writings, of what nature soever, belonging to the said Daniel Clark, came into the sole possession of him, the said Richard Relf.

And your orator and oratrix further show unto this honorable court, and expressly charge, that the said will of 1813, made by the said Daniel Clark in favor of said Myra, came into possession of the said Richard Relf, immediately upon the death of the said Daniel Clark, and that the said Richard Relf fraudulently concealed, suppressed, or destroyed the same, or caused it to be concealed, suppressed, or destroyed, and did substitute in its place or stead the said old revoked will of 1811, in which he, the said Richard Relf, was named as executor; and that the said last will of 1813 was never seen by any one after the death of the said Daniel Clark, except by the said Richard Relf and Beverly Chew, and their confederates.

And your orator and oratrix further show unto this honorable court, and expressly charge, that the said Richard Relf did fraudulently cause the said old revoked will, made in 1811, to be admitted to probate in the probate court for the parish and city of New Orleans, and procured himself, the said Richard Relf, to be sworn and authorized by the said probate court as the testamentary executor of the said Daniel Clark.

And your orator and oratrix also show unto this honorable court that the said Beverly Chew did also, soon after the death of the said Daniel Clark, to wit, in the month of January, 1814, procure himself to be sworn and authorized by the said court of probates for the parish and city of New Orleans to act as testamentary executor of the said Daniel Clark, under the said revoked will of 1811.

And your orator and oratrix show further unto this honorable cour that when the said Richard Relf and Beverly Chew took upon themselves the office of testamentary executors of the said Daniel Clark, as aforesaid, there was no relative or any person claiming to be heir of the said Daniel Clark in the State of Louisiana; that your oratrix was then an infant, under the age of seven years, and resided, at the time,
80 in the city of Philadelphia, in the State of Pennsylvania, with the family of the said Samuel B. Davis, and that Mary Clark, the mother of the said Daniel Clark, who was named, as aforesaid, devisee of the said Daniel Clark, in the said old revoked will of 1811, was also then a resident of the State of Pennsylvania, and continued to reside there until her death, which happened some years after the death of the said Daniel Clark; that the said Daniel Clark was a native of Ireland, from which country he emigrated to Louisiana, as your orator and oratrix have been informed and verily believe, in or about the year 17 ;

and that all his immediate relatives and family resided, at the time of his death, either in Ireland or the State of Pennsylvania, and that none of them ever visited Louisiana until many years after his death; that the said Richard Relf and Beverly Chew fraudulently possessed themselves, immediately after the death of the said Daniel Clark, of the personal estate, effects, and credits of the said Daniel Clark, to a great amount, and also entered into possession of the said real estates of the said Daniel Clark, and unto the receipts of the rents and profits thereof, by falsely and fraudulently representing the said estate to be insolvent; and by other fraudulent means continued, and were enabled to continue, and have ever since continued, and now are, in such possession, or in possession of a large portion thereof. And your orator and oratrix also show that the said Richard Relf and Beverly Chew made sales of the property and effects, real and personal, of the said Daniel Clark, and have received very large sums of money, amounting to several hundreds of thousands of dollars, from the said estate, real and personal, and have retained in their hands, or otherwise appropriated or disposed of the same for their own uses and purposes; and that in all such actings and doings, and in all matters relating to the said estate, they, the said Richard Relf and Beverly Chew, have acted fraudulently and without the knowledge, consent, or approbation of your orator and oratrix, or of either of them, or of any other person or persons having a right or being duly and legally authorized to sanction, consent to, or approve of the same.

And your orator and oratrix further show unto this honorable court that from and after the time of the death of the said Daniel Clark, and until about the year 1832, when your oratrix, the said Myra Clark Whitney, became the wife of your orator, the said William Wallace Whitney, your oratrix, the said Myra, continued to reside in the family of the said Samuel B. Davis, who lived during all or nearly all that time in the State of Pennsylvania; and your orator and oratrix also show and expressly charge that during the life time of the said Daniel
81 Clark, the father of your oratrix, the said Myra, your oratrix, was always known and called by her true and rightful name of Myra Clark, and by no other name; and that from and after the death of the said Daniel Clark, until at or about the time of the marriage of your oratrix, the said Myra, with your orator, the said William Wallace Whitney, your oratrix, the said Myra, was designated and called, in the family of the said Samuel B. Davis, by the name of Myra Davis, and by no other name, and was kept in ignorance of her real name, parentage, and true history, and of her rights and her title to the inheritance and possession of the estate of the said Daniel Clark, and was consequently unable, during all that time, to take the necessary measures for asserting her title to the said inheritance of her father, the said Daniel Clark; that at or about the time of the marriage of your oratrix, the said Myra, with your orator, the said William Wallace Whitney, your oratrix was brought, by accident, to the discovery of her true name and parentage, and was subsequently made more fully acquainted with the circumstances of her history and rights by the said Samuel B. Davis and others; and that your orator and oratrix have, ever since the time of the said marriage of your oratrix with your orator, been, and are now, actively engaged in endeavors to establish the legal rights and claims of your oratrix, the said Myra, to the property and estate, real and personal, of the said Daniel Clark.

And your orator and oratrix further show unto this honorable court that the said Mary Clark died in the year 18 , as your orator and ora-

trix are imformed and verily believe, and that your orator and oratrix have been informed and verily believe the next heirs and relatives left by the said Mary Clark, surviving her at her decease, were, besides your oratrix, the said Myra, Eleonor O'Bearne, a daughter of the said Mary Clark; Jane Green, wife of George Green and daughter of the said Mary Clark; and Sarah Campbell, a grand daughter of the said Mary Clark.

And your orator and oratrix show further unto this honorable court that Mrs. Widow Holliday and John Holliday now occupy and possess, or claim to hold, as owners or otherwise, the first above described enumerated piece, parcel, or tract of land or plantation, purchased by the said Daniel Clark of one Stephen Henderson for $120,000; that Ramon Masana, Jean B. Ambroise, John Minturn, Belifin Berdoule, Manuel Marquez, John Mathieu, Thos. D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, the New Orleans & Carrollton Railroad Company, Mrs. Widow Jaubert, Charles Patterson, and Charles Forde, each claims to hold severally, as owner or otherwise, some portion, piece, or
82 parcel of the second above described and enumerated tract, portion, or square of land, situated in the suburb St. Mary of the city of New Orleans, and bounded on one side by Philippa street, on the second side by Poydras street, on the third side by Circus street, and on the fourth by Perdido street, and the said Ramon Masana, Jean R. Ambroise, Jean Mathieu, Antoine Piernas, Mrs. Widow Jaubert, and Charles Patterson, and also Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Guichanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise and Charles Edwards are in the actual possession and occupation of the said second above described and enumerated tract, portion, or square of land, bounded as aforesaid by Philippa, Poydras, Circus, and Perdido streets.

And your orator and oratrix further show that Francois Xavier Martin and J. Hopkins each claims to hold severally, as owner or otherwise, some portion, piece, or parcel of the third above described and enumerated piece, parcel, or tract of land, situated in the parish of New Orleans, on the right-hand side of the Gentilly road, on going toward Gentilly from the city of New Orleans, being twenty-two arpents in front (more or less) on the said Gentilly road; and that M. Binge occupies or possesses some portion, piece, or parcel thereof; that Réné Lemonier occupies and possesses, and claims to hold, as owner or otherwise, the fourth above described and enumerated lot of land, with the buildings and tenements thereunto belonging, known and designated as lots numbers 184 and 186, in Royal street, in the city of New Orleans; that F. H. Petitpain and Toledano claim to hold, severally and jointly, as owners or otherwise, some piece or portion of the fifth above described and enumerated three lots of land, adjoining together and forming but one piece or parcel of land on the southerly corner of the square of ground in the city of New Orleans, bounded by Toulouse, Rampart, and St. Peter and Burgundy streets, and each lot being about sixty feet front and one hundred and twenty feet deep, and that Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, and Toledano severally occupy and possess the same. And your orator and oratrix also show that the mayor, aldermen, and inhabitants of the city of New Orleans claim to hold, as owners or otherwise, the sixth above described and enumerated piece, parcel, or tract of land, situated in the quarter of the Bayou St. John, and containing about one hundred and

thirty-five arpents, superficial measure, be the same more or less; that Augustus Pepie and one Wright occupy and possess, jointly and severally, as owners or otherwise, the tenth above described and enumerated
83 piece, parcel, or square of land in the suburb St. John, of the city of New Orleans, known and designated as square No. 4, on the said plan of the said suburb. And your orator and oratrix further show that Gabriel Winter occupies and claims to hold, as owner or otherwise, the eleventh above described and enumerated plantation or tract of land, situated on the right bank of the Bayou Lafourche, opposite the town of Donaldsonville, and measuring eleven arpents in front on the river Mississippi, and twenty-nine arpents on the said Bayou Lafourche, be the same more or less; that Philip Miner, George Kenner, and Duncan Kenner claim to hold and be entitled to, as joint or several owners or otherwise, the above twelfth described and enumerated tract of land, purchased by the said Daniel Clark of William Simpson, as hereinbefore stated, and which is situated in the parish of Ascension, and county of Acadia, on the left bank of the Mississippi, measuring in front, on said Mississippi River, eighteen and one-half arpents, and extending back from said Mississippi in depth forty arpents, and that the said George Kenner and Duncan Kenner occupy the same; and also that Leland Ferier occupies and possesses, and claims to hold, as owner or otherwise, the thirteenth above described and enumerated lot, piece, or parcel of land in the city of New Orleans, in the square bounded by Delord street, Tivoli Place, St. Charles street, St. Joseph street, and Camp street.

And your orator and oratrix also show unto this honorable court, that Francois de la Croix, on or about the 11th day of October, 1813, being after the death of the said Daniel Clark, took possession of, and has ever since held and retained, or disposed of for his own use and benefit, the following-named twenty slaves, the property of the said Daniel Clark, and has enjoyed the profits and services of the same: that is to say, the slaves named Meroke, Phœbe, Flibo, Thom, John, Jamboun, Fanny, Wallace, Leven, John, Wury, Esther, James McCall, Hannah, Phil, Betsey, Monsin, Esther Morning, Cambridge, Rachel; and that the said Francois Dusua de la Croix did also, on or about the 11th day of December, 1813, take possession of, and has ever since held and retained, and has enjoyed the services and profits, or has disposed of for his own use and benefit, the following-named fifty-five slaves: that is to say, Solomon, a negro man, aged 40 years; Jacob, 25 years; Jacques, 18 years; Paul, 22 years; Randolph, 30 years; Ned, 30 years; Isaac, 20 years; Austin, 25 years; Charles, 35 years; Davis, 20 years; Brice, 40 years; Tom, 35 years; Bob, 26 years; Haley, 30 years; Harry, 15 years; Coxe, 40 years; Sam, 40 years; Janvier, 40 years; Rose, 25 years; Peter, 45 years; Chloe, 30 years; Morrow, 35 years;
84 George, 10 years; Sam, 40 years; Gian, 10 years; Elisha, 18 years; Spencer, 44 years; Theimar, 25 years; Betty, 26 years; George, mulatto, 30 years; Dorianna Smith, 16 years; little Winny, 20 years; Judith, 25 years; Darse, or Dive, 5 years; Ben, 26 years; Jack, 25 years; Mary, 30 years; Joe, 15 years; Victoire, 10 years; Sukey, 12 years; Joe, 13 years; Davis, 30 years; John Harrod, 25 years; Wallis, 30 years; Andre, 40 years; Squire, child; Tom, child; Davis, child; Ann, child; Gabriel and George, 10 years; Janin, 16 years.

And your o ator and oratrix further show unto this honorable court, that Celestin Robert Avart, soon after the time of the death of the said Daniel Clark, and on or about the 8th day of October, 1813, took possession of, and has ever since held and retained, or disposed of for his

own use and benefit, the following-named five slaves, owned by the said Daniel Clark, and has enjoyed the services and profits of the same: that is to say, the slave Molly, aged 46 years; Nancy, aged 28; Kery, aged 12; Tom, aged 8; and Isaac, aged 22: that L. Fortier, soon after the death of the said Daniel Clark, and on or about the 11th day of October, 1813, took possession of, and has ever since held and enjoyed the services and profits of, or disposed of for his own use and benefit, a slave owned by the said Daniel Clark, and named Patience; that Francois Pascalis Labarre, on or about the 11th day of October, 1813, took possession of, and has ever since held and retained, and received and enjoyed the services and profits of, or disposed of for his own use and benefit, two slaves owned by the said Daniel Clark, named Sally, aged 16 years, and Betty, aged 15; that Soniat Dufossat, on or about the 18th day of October, 1813, took possession of, and has ever since held and retained, and received and enjoyed the services and profits of, or disposed of for his own use and benefit, six slaves owned by the said Daniel Clark, and named Sam Harris, aged 26 years; Rachel, aged 25; George, aged 8; James, aged 6; Champion, 1; and Fanny, 22: that Louis Desdunes, fils, on or about the 21st day of October, 1813, took possession of, and has ever since held and retained, and received and enjoyed the profits and services of, or disposed of for his own use and benefit, one slave, the property of the said Daniel Clark, named , and aged 16 years: that Herbert Fortier, on or about the 23d day of October, 1813, took possession of, and has ever since held and retained, and received and enjoyed the services and profits of, or disposed of for his own use and benefit, three slaves, the property of the said Daniel Clark, and named Jennie, aged 26 years; Kitty, aged 5; and Henrietta, aged 8. And your orator and oratrix show unto this honorable court, and expressly charge, that the said last-named ninety-
85 one slaves were the sole and absolute property of the said Daniel Clark, and were owned by him at the time of his decease.

And your orator and oratrix also show unto this honorable court, and expressly charge, that the said Mrs. Holliday, John Holliday, Jean B. Ambroise, Ramon Masona, John Minturn, Belifine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, The New Orleans and Carrollton Railroad Company, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise, Charles Edwards, Francis Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Petitpain, the mayor, aldermen, and inhabitants of the city of New Orleans, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, Augustus Pepie, Mr. Wright, Gabriel Winters, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francois Dusuau de la Croix, Celestine Robert Avart, L. Fortier, Francis Pascalis Labarre, Soniat Dufossat, Louis Desdunes, fils, and Herbert Fortier, do each respectively hold, occupy, possess, or claim to the several plantations, lots, pieces, or parcels of land, slaves, and personal estate, by them respectively held, occupied, possessed or claimed, as your orator and oratrix have hereinbefore set forth, by, under color (and not otherwise) of a pretended title, founded upon divers illegal, fraudulent, improper, and invalid sales of the said plantations, lots, pieces, or parcels of land, slaves, and personal estate, by them or each of them respectively held, occupied, possessed, or claimed as aforesaid, made by the said Richard Relf and Beverly Chew, or one of them, as pretended executors of the

said Daniel Clark, or pretended attorneys of the said Mary Clark or otherwise; and that they have severally enjoyed or received for a long space of time the rents, services, profits, and issues of the said plantations, lots, pieces or parcels of land, slaves and personal property by them and each of them respectively held, occupied, possessed or claimed, as hereinbefore specified.

And your orator and oratrix further show unto this honorable court, and expressly charge that the said Richard Relf and Beverly Chew, or one of them, did also immediately upon the death of the said Daniel Clark, possess themselves of all and every of the books and papers of the said Daniel Clark, and of the title deeds of his real estate and other estates.

And your orator and oratrix also show to this honorable court, and expressly charge that your oratrix, the said Myra Clark Whitney,
86 was the only surviving child or descendant of the said Daniel Clark at the time of his death, and that your oratrix, the said Myra Clark Whitney, was, upon the death of the said Daniel Clark, entitled as his forced heiress at law and his universal heiress, by him instituted and appointed in his said last will made by him in 1813, to all the estate, real and personal, of the said Daniel Clark. And your orator and oratrix also show unto this honorable court, and expressly charge, that inasmuch as your oratrix, the said Myra, was the only surviving and legitimate child or descendant of the said Daniel Clark at the time of the said Daniel Clark's death; and inasmuch as the said last will of the said Daniel Clark, made by him as aforesaid in 1813, was fraudulently concealed, suppressed, or destroyed by the said Richard Relf, as above stated; and also, inasmuch as the said old revoked will of 1811, alleged to have been made by the said Daniel Clark in favor of his mother, the said Mary Clark, was produced and procured to be admitted to probate as the last will of the said Daniel Clark, by such fraud and practice of the said Richard Relf as hereinbefore stated, that for and notwithstanding the same, the said real and personal estate of the said Daniel Clark, hereinbefore described and enumerated, and all other estates real and personal, movable and immovable of the said Daniel Clark, descended to and became vested in, your oratrix, the said Myra Clark Whitney, as the forced heiress at law and universal devisee of the said Daniel Clark.

And your orator and oratrix show further unto this honorable court, that they or some person or persons for them, have made frequent applications to the said Eleonor O'Bearne, Jane Green, and her husband George Green, Sarah Campbell, Richard Relf, and Beverley Chew, —— Holliday, John Holliday, Ramon Masona, Jean B. Ambroise, John Minturn, Belefine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, The New Orleans and Carrollton Railroad Company, the mayor, aldermen, and inhabitants of the city of New Orleans, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise, Charles Edwards, Francis Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Petitpain, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, Augustus Pepie, Mr. Wright, Gabriel Winter, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francis Dusuau de la Croix, Celestin Robert Avart, L. Fortier, Francis Pascalis Labarre, Soniat Dufossat, Louis Desdunes, fils, and
87 Herbert Fortier, respectively to surrender and deliver up to your oratrix, the said Myra Clark Whitney, the possession of such

portion of the real and personal estate and slaves owned by the said Daniel Clark, at the time of his decease, as is by them or each of them respectively held, occupied, possessed or claimed, as owner or otherwise, together with all title deeds, vouchers, and documents relating to the same or any part thereof, and severally to come to a just and true account with your orator and oratrix for the rents, profits, issues, and services thereof respectively, which have been received or enjoyed by them or either of them, at any time since the death of the said Daniel Clark, with which just and reasonable requests your orator and oratrix had well hoped the said defendants would have respectively complied as in justice and equity they ought to do.

But now so it is, may it please this honorable court, that the said Eleonor O'Bearne, George Green, and Jane Green his wife, Sarah Campbell, Richard Relf, Beverly Chew, Holliday, John Holliday, Ramon Masona, Jean B. Ambroise, John Minturn, Belefine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, the New Orleans and Carollton Railroad Company, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise, Charles Edwards, Francis Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Petitpain, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, the mayor, aldermen, and inhabitants of the city of New Orleans, Augustus Pepie, Mr. Wright, Gabriel Winter, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francis Dusuau de la Croix, Celestin Robert Avart, L. Fortier, Francis Pascalis Labarre, Soniat Dufossat, Louis Desdunes, fils., and Herbert Fortier, and to and with divers other persons, at present unknown to your orator and oratrix, whose names, when discovered, your orator and oratrix pray may be herein inserted and they made parties defendants hereto, with proper and apt words to charge them with the premises and contriving how to injure or oppress your orator and oratrix in the premises, sometime give out and pretend that the said Daniel Clark never did make and execute the said will of 1813, in favor of your oratrix, as has been above stated, and that the said old will of 1811 was duly made and executed by the said Daniel Clark, and was left by him, at the time of his decease, unrevoked, and as his true and only last will and testament; whereas, your orator and oratrix expressly charge the con-
88 trary of said pretence to be true, and that the said Daniel Clark did make and execute the said will made by him, as hereinbefore stated, in the year 1813, in favor of your oratrix, and did therein devise and bequeath all his estate, real and personal, to your oratrix, the said Myra Clark Whitney, and did also therein and thereby declare your oratrix, the said Myra Clark Whitney, to be the legitimate daughter of the said Daniel Clark, and did make and order therein the other dispositions and bequests hereinbefore stated by your orator and oratrix to have been made and ordered by him in the said will, made and executed as aforesaid, in 1813, by him, the said Daniel Clark; and the said will of 1813 operated as a full and perfect revocation of the former will alleged to have been made by the said Daniel Clark in 1811, and of every part and provision thereof, and that the said will of 1811 ought to be set aside and the said will of 1813 established and confirmed, and the real and personal estate of the said Daniel Clark declared to be descended to your oratrix, the said Myra Clark Whitney, as the heir at law and devisee of the said Daniel Clark. And at other times the said

confederates will allege that some doubts have arisen concerning the legitimacy of your oratrix, the said Myra Clark Whitney, and pretend that the said Daniel Clark was never married to Zuline Née Carriere, by whom he had your oratrix, the said Myra Clark Whitney, and that the said Zuline Née Carriere was the lawful wife of one Jerome De-Grange, who was still living when she became the mother of your oratrix by the said Daniel Clark, and that therefore, upon the death of the said Daniel Clark, the equitable and legal interest in all the said real and personal estate and slaves descended to, and became vested in the said Mary Clark, as his forced heir at law; whereas your orator and oratrix expressly charge the contrary of all such pretences and allegations to be true, and that your oratrix, the said Myra Clark Whitney, is and was the legitimate child of the said Daniel Clark, and that the said Daniel Clark was married to, and was the lawful husband of, the said Zuline Née Carriere at and before the time when she became the mother of your oratrix, the said Myra, by the said Daniel Clark, and that the said Zuline Née Carriere was not, and never had been at any time, the lawful wife of the said Jerome DeGrange, or of any other man than the said Daniel Clark, when she became the mother of your oratrix, the said Myra, as aforesaid; and that if any marriage ever did take place between the said Zuline and the said DeGrange, the same was utterly null and void from the beginning, on the ground that the said Jerome DeGrange, at the time of his contracting such marriage (if he did contract the same), with the said Zuline, was the lawful wedded husband of another woman
89 to whom he had been previously married, and who was still living, all of which the said confederates will at other times admit; but then they pretend that the said Richard Relf and Beverly Chew made sales of the said real and personal estate, and the said slaves of the said Daniel Clark, as testamentary executors of a will of the said Daniel Clark, which had been admitted to probate in the probate court for the parish and city of New Orleans, and as attorneys in fact of the said Mary Clark, the devisee in the said probated will named, and that the purchasers of the said real and personal estate of the said Daniel Clark, at the sales thereof, did become such purchasers for full and valuable considerations, and without notice of any revocation and invalidity of the said probated will alleged to have been made by the said Daniel Clark in 1811, and in which the said Richard Relf and Beverly Chew were named executors, and without notice of the rights or claims of any other person than the said Mary Clark to the said estate of the said Daniel Clark, or any part thereof; and therefore they insist that although the said will of 1811 may not have been the last will of the said Daniel Clark, and although your oratrix, the said Myra, may have been the true and lawful heiress of the said Daniel Clark, yet they should not be affected thereby, and that the titles acquired by the said purchasers under the said sales made of the said real and personal estate and slaves of the said Daniel Clark, by the said Richard Relf and Beverly Chew, are good and perfect titles, and cannot be invalidated or disturbed in any manner by the revocation or invalidity of the said will of 1811, or of any claim or claims, or title which your said oratrix, the said Myra, may have had, or now has, to the said estate and slaves, or any portion thereof; whereas, your orator and oratrix expressly charge the contrary of all such pretences to be true, and that the said Richard Relf and Beverly Chew did not, nor did either of them, act in their said assumed capacities of pretended executors of a will of the said Daniel Clark, and attorneys of the said Mary Clark legally, nor did

they, or either of them, when acting in both or either of such assumed capacities, observe or comply with the formalities, or adopt the measures prescribed by law as requisite to give any validity or authority to any act or acts done, or assumed to be done by them, in such assumed capacities of executors or attorneys in relation to the said real and personal estate and slaves of the said Daniel Clark; that a true and faithful inventory and a just appraisement by two duly appointed and sworn appraisers of the said real and personal estate of the said Daniel Clark had not been made, or caused to be made, according to law, by the said Richard Relf and Beverly Chew, or either of them, before the said sales were made; that proper and legal orders to sell were not obtained by the said Richard Relf and Beverly Chew, or either
90 of them, from the judge authorized to grant or make such order, before the sales were made; that all, or nearly all, the said sales were made by private contract, and not at public auction, as they should, according to law, have been made; and that the moneys severally paid by the said purchasers for the portions sold to them respectively of the said real and personal estate and slaves, by the said Richard Relf and Beverly Chew, or either of them, were not respectively full and valuable considerations for said portions of said real and personal estate and slaves; that many of said sales were made by the said Richard Relf and Beverly Chew, as pretended testamentary executors, after the year of testamentary execution had expired, and when they had not, nor had either of them, been continued by the order of any judge or court of competent authority in their said functions of executors; that the said Richard Relf and Beverly Chew had not, nor had either of them, caused themselves, or either of them, to be duly recognized by a court of competent authority as the attorney or attorneys of the said Mary Clark, and that all acts of the said Richard Relf and Beverly Chew, in relation to the estate of the said Daniel Clark, were, upon the face of the proceedings in the foregoing and many other respects, illegal and informal, and fraudulent and void, by the laws of the land, and so they were necessarily known to be by the said purchasers at the said sales; and that the making, execution, and existence of the said last will of the said Daniel Clark, made by him in 1813, and its fraudulent concealment, suppression, and destruction, at his death, by the said Richard Relf, were notoriously known and reported at the time in Louisiana, and that the said purchasers, on the occasion of making of the sales aforesaid, and afterwards, and their heirs and assigns, had some knowledge, notice, information, belief, or suspicion, or reason for belief or suspicion, and did, in their consciences, believe or suspect, that the said Richard Relf and Beverly Chew had acted fraudulently, improperly, and against equity and good conscience, in procuring to be admitted to probate the said will, alleged to have been made by the said Daniel Clark in 1811, and in having procured the appointment of themselves, the said Richard Relf and Beverly Chew, by the probate court, as executors of the said will of 1811, and representing the said real and personal estate of the said Daniel Clark to have been devised to, and inherited by, the said Mary Clark; all of which the said confederates will at other times admit; and then they will pretend that they have delivered or
91 sent to your orator and oratrix full, true, and just accounts of the said real and personal estate and slaves of the said Daniel Clark, all of the rents, profits, issues, and services thereof, and of all the business or concerns appertaining or relating thereto; whereas your orator and oratrix expressly charge the contrary of such pretence to be true, and that the said confederates have not, nor has either of them, deliv-

ered or sent to your orator and oratrix, or either of them, any account whatever; all of which actings and doings and pretences tend to the manifest wrong and injury of your orator and oratrix, and are contrary to equity and good conscience.

In tender consideration whereof, and forasmuch as your orator and oratrix are remediless in the premises by the strict rule of the common law, and are unable to obtain adequate and complete relief, except on the equity side of this honorable court, where matters of this and the like nature are alone properly cognizable and relievable; and your orator and oratrix expressly charge that the said Eleonor O'Bearne, Geo. Green, and Jane Green, his wife, and Sarah Campbell, if now living, are aliens and subjects of the king of Great Britain and Ireland, and that Richard Relf and Beverly Chew, Holliday, John Holliday, Ramon Masona, Jean B. Ambroise, John Minturn, Belefine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, The New Orleans and Carrollton Railroad Company, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise, Charles Edwards, Francois Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Petitpain, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, The Mayor, Aldermen, and Inhabitants of the City of New Orleans; Augustus Pepie, Mr. Wright, Gabriel Winters, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francis Dusuau de la Croix, Celestine Robert Avart, L. Fortier, Francis Pascalis Labarre, Soniat Dufossat, Louis Desdunes, fils, and Herbert Fortier, are citizens of the State of Louisiana, and that your orator and oratrix are citizens of the State of New York.

To the end, therefore, that the said Eleonor O'Bearne, Geo. Green and Jane Green, his wife, Sarah Campbell, Richard Relf, Beverly Chew, Holliday, John Holliday, Ramon Masona, Jean B. Ambroise, John Minturn, Belefine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, The New Orleans and Carrollton Railroad Company, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah
92 M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Viginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise, Charles Edwards, Francois Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Pettipain, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, The Mayor, Aldermen, and Inhabitants of the city of New Orleans, Augustus Pepie, Mr. Wright, Gabriel Winters, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francis Dusuau de la Croix, Celestin Robert Avart, Francis Pascalis Labarre, Soniat Dufossat, Louis Desdunes, fils, and Herbert Fortier, and the rest of the confederates, when discovered, may, without oath, full, true, direct, and perfect answer make, your orator and oratrix hereby expressly waiving the necessity of making such answer, upon the oath of the said confederates, or of either of them, to all and singular the matters and things hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they, and each of them, thereunto distinctly and specifically interrogated; and not only to the best of their, and each of their, respective knowledge and remembrance, but also as to the best of their respective information, hearsay, and belief; and that the said confederates may also severally set forth what right, title, or interest they respectively have

or claim in or to the real estate and slaves of the said Daniel Clark, or any and what part thereof, and how and in what manner they derive and make out the same, and by and under what deed or deeds, writing or writings, and may set forth the date and contents of all such deeds and writings; and that the said Eleonor O'Bearne, George Green and Jane Green, his wife, Sarah Campbell, Richard Relf, and Beverly Chew, Holliday, John Holliday, Ramon Masona, Jean B. Ambroise, John Minturn, Belefine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, The New Orleans and Carrollton Railroad Company, the mayor, aldermen, and inhabitants of the city of New Orleans, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane M'Crea, Marie Louise, Charles Edwards, Francois Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Petitpain, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, Augustus Pepie, Mr. Wright, Gabriel Winter, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francis Dusuau de la Croix, Celestin Robert Avart, L. Fortier, Francis Pascalis Lubarre, Soniat Dufossal, Louis Desdunes, fils, and Herbert Fortier, and the rest of the confed-
93 erates, may answer the premises; and that the said will, made by the said Daniel Clark, in the year 1813, in which he devised all his estate, as aforesaid, to your oratrix, the said Myra, and the provisions and dispositions thereof, be carried into execution by and under the decree of this honorable court, and the rights and interests of your orator and oratrix, under the same, be declared and secured; and that it may be declared that the said will alleged to have been made by the said Daniel Clark in 1811 had been utterly revoked and declared to be good for nought by him, the said Daniel Clark, in his lifetime; and that the said will, so alleged to have been made by the said Daniel Clark in 1811 is, in fact and in truth, utterly void and of no effect; and that the said will, made as aforesaid by the said Daniel Clark in 1813, was duly made and executed by him, the said Daniel Clark, with all the formalities and other requisites necessary for passing real and personal estate by devise, and that it was the only true and valid will of the said Daniel Clark, and contained a good and valid devise and bequest of all the real and personal estate and slaves of the said Daniel Clark to your oratrix, the said Myra Clark Whitney; and that in and by the same he, the said Daniel Clark, did acknowledge and declare your oratrix, the said Myra Clark Whitney, to be the legitimate daughter of him, the said Daniel Clark; and that the said Daniel Clark departed this life on or about the 16th day of August, 1813, without altering or revoking his said will so made by him as aforesaid in the year 1813, and containing the said devise to, and the said declaration of acknowledgment of the legitimacy of your oratrix, the said Myra Clark Whitney; and that the said declaration or acknowledgment of the legitimacy of your oratrix, the said Myra, made, as aforesaid, by the said Daniel Clark in his said last will, made by him in the year 1813, was a full and perfect and effectual act of legitimation of your oratrix, the said Myra Clark Whitney, if any such act would have been necessary to establish the legitimacy of your oratrix, the said Myra, and that it vested in your oratrix all the rights, capacities, and privileges of a legitimate child; and also, that it may be declared that your oratrix, the said Myra, is the legitimate child of the said Daniel Clark, and that the said Daniel Clark was the lawful husband of the said Zuline née Carriere, the mother of your

oratrix, the said Myra, at and before the time when she, the said Zuline, became the mother of your oratrix, the said Myra, by the said Daniel Clark; and that it may be declared that all and every of the said sales of the said real and personal estate, and the said slaves of the said Daniel Clark, made by the said Richard Relf and Beverly Chew, or
94 by either of them, as the executor or executors of the said revoked will of 1811, or as the attorney or attorneys of the said Mary Clark, or in any other capacity, are null and void and of no effect; and that the said real and personal estate and slaves of the said Daniel Clark descended to your oratrix, the said Myra, upon the death of the said Daniel Clark as his, the said Daniel Clark's, devisee and heir at law; and that the said Eleonor O'Bearne, Geo. Green, and Jane Green, his wife; Sarah Campbell, Richard Relf, Beverly Chew, Holliday, John Holliday, Ramon Masona, Jean B. Ambroise, John Minturn, Belefine Berdoule, Manuel Marquez, John Mathieu, Thomas D. Hailes, Mr. Callaway, Jean Barabino, Antoine Piernas, The New Orleans and Carrollton Railroad Company, Mrs. Widow Jaubert, Charles Patterson, Charles Fonde, Mrs. Widow P. Mitchell, Sarah M. Alexander, Antoine Caitano, B. Doyle, Mrs. West, Virginia Duplantier, Claude Gauchanette, Patrick Hogan, J. B. Barker, Jane McCrea, Marie Louise, Chas. Edwards, Francois Xavier Martin, J. Hopkins, M. Binge, Réné Lemonier, F. H. Petitpain, Toledano, Etienne Cusin, J. H. Field, P. O. Sorbet, Claude Samory, the mayor, aldermen, and inhabitants of the City of New Orleans, Augustus Pepie, Mr. Wright, Gabriel Winter, Philip Minor, George Kenner, Duncan Kenner, Leland Ferier, Francis Dusuau de la Croix, Celestin Robert Avart, L. Fortier, Francis Pascalis Labarre, Soniat Dufossat, Louis Desdunes, fils, and Herbert Fortier may be decreed to deliver up to your orator and oratrix the possession of all the said real estate and slaves hereinbefore enumerated and described, and now held and possessed, or claimed to be held and possessed, by them, or either of them, jointly or severally, or in any other manner, as owners or otherwise, and to come, severally, to an account with your orator and oratrix, for the rents, profits, issues, and services of the said real estate and slaves of the said Daniel Clark, which have been possessed or received by the said defendants, or any of them, or by any other person or persons, by their or either of their order, or for their or either of their use, since the death of the said Daniel Clark, and respectively to pay over to your oratrix whatever shall be found due from them, or any of them, upon the taking of such account; and that in the taking of such account, the said defendants may respectively be charged with interest for such balance as shall appear to have been in their hands from time to time, and that the said defendants may be respectively decreed to deliver up to your orator and oratrix all deeds and other writings in their hands relating to the said real and personal estate and slaves of thesaid Daniel Clark; and that an account may also be taken of the personal estate and effects of the said Daniel
95 Clark, and the profits, issues, and profits thereof, possessed or received by, or by the order of, or for the use, or which may have come to the hands of the said Richard Relf and Beverly Chew, or either of them, as said executors of the said revoked will of 1811, or as said attorneys of the said Mary Clark, or by the order, or for the use, or which have come to the hands of any other of the said confederates; and that the said Richard Relf and Beverly Chew, and the rest of the confederates, may be respectively decreed to pay to your orator and oratrix what shall be found due from them, or any of them, on account of the said personal estate and effects of the said Daniel Clark; and

that your orator and oratrix may have such further or other relief in the premises as the nature of the case may require, and as may seem meet to this honorable court, and agreeable to equity and good conscience.

96 And your orator and oratrix, as in duty bound, will ever pray, &c.

(Signed) JAMES W. WHITE,
Solicitor for Complainants.

CLERK'S OFFICE U. S. DISTRICT COURT,
Eastern District of Louisiana.

I hereby certify the foregoing to be a true copy of the original on file in this office.

Witness my hand and the seal of the court, this 16th day of August, 1836.

(Signed) T. W. COLLENS, *Dep. Clk.*

Filed July 28, 1836.

97 *Bill of complaint, with schedule A annexed, in suit No.* 1765.

Page 1. In chancery.

To the judges of the United States circuit court of the fifth circuit within and for the district of Lousiana:

Edmund Pendleton Gaines and Myra Clark, his wife, who are citizens of the State of Tennessee, bring this their bill of complaint against Richard Relf and Beverly Chew, who reside in the city of New Orleans, and who are both citizens of the State of Louisiana, and therefore your orator and oratrix complain and say that your oratrix is the legitimate and only child and heir at law of Daniel Clark, late of the city of New Orleans and State of Louisiana, and a citizen of said State, who departed this life in said city of New Orleans on or about the thirteenth day of August, in the year of our Lord one thousand eight hundred and thirteen.

That your oratrix was born in lawful wedlock of the said Daniel with one Zulime née Carriere, who at the time of said marriage was, and is now, a resident of the said city of New Orleans.

That the said marriage of said Daniel Clark with said Zulime née Carriere was solemnized and celebrated at the city of Philadelphia, in the State of Pennsylvania, by a priest of the Roman Catholic church, in presence of a witness or witnesses, with a strict observance of all the necessary forms and ceremonies prescribed by the laws of the said State of Pennsylvania for the solemnization of marriage, in or about the year of our Lord one thousand eight hundred and three.

That your oratrix is the only issue of said marriage, and that she was born on or about the day of July, in the year of our Lord one thousand eight hundred and six, and was at all times recognized and treated by the said Daniel Clark, until his death, as his only child and lawful heir to his estate.

That the said Daniel Clark, at his death, was possessed of a large and valuable estate, worth at that time, as your orator and oratrix are informed and verily believe, nearly, if not more than, the sum of one million of dollars, lawful money of the United States, over and above all his just debts, of whatsoever nature or description; which said estate consisted of lands, tenements, mesuages and chattels, real prop-

erty, immovable and movable; slaves, bonds, mortgages, notes, book accounts, stocks, securities of various descriptions, contracts and other choses in action, and money. That said lands, to which he had claims, either as owner or otherwise, are located in the now States of Louisiana, Mississippi, Alabama, Missouri, Illinois, Kentucky, and Ohio.

That a schedule of said estate left by said Daniel Clark, real and personal and slaves, as far as your orator and oratrix have hitherto been able to discover, is hereunto annexed, marked A, which your orator and oratrix pray may be made a part of this their bill of com-
98 plaint; though your orator and oratrix are informed, and have good reason to believe, and do believe, that the said schedule does not embrace the whole of said estate, as would appear if the said Richard Relf and Beverly Chew would make a fair and honest disclosure of the facts which have come to their knowledge respecting said estate, or would exhibit for the inspection of your orator and oratrix all the books, papers, documents, and memoranda of the said Daniel Clark which have come into their possession, and which they became possessed of in an unlawful, fraudulent, and surreptitious manner, and have withheld, concealed, and suppressed, and do still withhold and conceal from your orator and oratrix, as hereinafter more particularly set forth and charged.

Your orator and oratrix further show unto your honors that the said Daniel Clark was born of honorable Irish parents, who immigrated to this country a short time after the achievement of American independence, and settled at or near Germantown, in the State of Pennsylvania. That at an early age he came to the city of New Orleans to reside—at the period when the then territory of Louisiana was under the dominion of Spain—where a field was opened to him, vast and rich it should seem, commensurate with his spirit of daring enterprise and lofty ambition; where was the germ of the emporium of the trade and commerce of the richest portion of the earth, which was the object of the foreign court intrigue and chicanery so characteristic of that period. His conspicuous, shining talents, his high-toned chivalry and unbending integrity, marked him as the man in whose counsels there must be safety, and in whom the right-minded in those distracted times were sure to find a firm friend. He thwarted foreign scheming, unmasked conspiracy at home, and to him is this nation mainly indebted for its richest acquisition. In his whole life he exhibited the most remarkable and admirable traits of character. His pride was kingly, and in the more homely, yet the more lovely attributes of the soul, he was pre-eminently conspicuous, as the sincere friend, the philanthropist, the republican. In the language of his bosom friend, "though he was a republican citizen, he carried his pedigree up to the ancient kings of Ireland." His generosity knew no bounds; its objects were, in the main, those from whom no return was or could be expected, save gratitude. At a very early age, he engaged in mercantile and commercial pursuits, in which his spirit of bold enterprise embraced the whole earth for its field. His storehouses were at every port on this continent; ships freighted with his merchandise were floating upon every sea. His sturdy hunters penetrated the fastnesses of the western sierras, and awoke the solitude of the pampas which repose at their base.

When, towards the close of his eventful life, he was called to represent this territory in Congress, his talents as a statesman, his wisdom and foresight commanded respect and admiration from the wisest men of that day, amongst whom were his most devoted friends.

His great wealth and high position afforded him many opportunities

for advancing the interests of those who sought the same field of enterprise which he had opened and so well improved. Industry
99 was never found by him struggling with poverty that he did not open his hand and his purse.

Amongst the many beneficiaries of his ample resources, the defendants, Richard Relf and Beverly Chew, stand conspicuous in this community, and throughout a large portion of our country; not less conspicuous, perhaps, for the extent and value of the benefits which they received from the said Daniel Clark during his life, than for the ingenuity with which they have despoiled the vast estate which he left at his death, leaving his aged mother to end her days in almost poverty and want, have sought to blast his memory with infamy, and to cast upon the world, homeless, friendless, and penniless, his only child, and in accomplishing this last, with his own gold have corrupted his bosom friend, to whom, with his latest breath, he, the said Daniel Clark, committed the sacred trust, the nurture and education of that child.

That your orator and oratrix are informed, and believe it to be true, that the late commercial house of the said Richard Relf and Beverly Chew, located in the city of New Orleans, and doing business under the firm-name and style of "Chew & Relf," was composed solely of the said Richard Relf and Beverly Chew, and that the said Daniel Clark aided and assisted said concern from his large pecuniary resources, and with his extensive credit, at such times as occasion suggested, and in such manner as opportunity favored, during the period of his active commercial pursuits.

That from a few years prior to or about the year one thousand eight hundred the said Daniel Clark was actively engaged in extensive commercial enterprise in connexion with one Daniel M. Coxe, of the city of Philadelphia, with one or more persons in the city of New York, and with one or more persons in the cities of Montreal and Quebec, until some time in or about the year one thousand eight hundred and eight or one thousand eight hundred and nine, at which period he withdrew entirely from such pursuits, and devoted himself to the care of his estate, and to the cultivation of social relations with his friends.

That in the early part of the month of May, in the year one thousand eight hundred and eleven, the said Daniel Clark having heard that the said Daniel M. Coxe, of Philadelphia, in consequence of the unfortunate results of his enterprises and speculations, had failed or become insolvent, and the rumor being that he, the said Daniel Clark, had become involved with the said Coxe, by reason of some informality in the act of dissolution with the said Coxe, he, the said Daniel Clark, immediately chartered a vessel and departed from New Orleans for Philadelphia, by sea.

That previous to his said departure, the said Daniel Clark conveyed in confidential trust, for the sole use and benefit of your oratrix, then about the age of five years, unto his then most trusted and devoted friends, Col. Joseph D. D. Bellechasse, now deceased, Col. Samuel B. Davis, now residing at Wilmington, in the State of Delaware, and Chevalier Francois Dusuau de la Croix, now residing in the city
100 of New Orleans, all of whom at that time resided in or near the city of New Orleans, lands and slaves, property of great value, and left in the hands of said Davis, in like trust, near thirty thousand dollars in money and securities; and also, as your orator and oratrix are informed and believe, two or three notes made by Wade Hampton in favor of said Daniel Clark, amounting in all to the sum of two hundred and fifty thousand dollars, or thereabouts, all of which he, the said

Daniel Clark, intended and declared should be appropriated to and for the sole use and benefit of your oratrix, in case of accident to him, the said Daniel Clark, on his then contemplated voyage. That having by these confidential trusts in the hands of his said friends secured to your oratrix the largest portion of his estate, and having left ample property for the discharge of his just debts, the support and maintenance of his aged mother, and to defray all expenses of administration, he, the said Daniel Clark, just before setting sail on his said voyage, to wit, on or about the twentieth day of May, one thousand eight hundered and eleven, by an olographic will, wholly written, dated, and signed by himself, disposed of the said remainder of his estate, real and personal, which said will is substantially in the words and figures following, to wit: "In the name of God, amen. I, Daniel Clark, of New Orleans, do make this my last will and testament. Imprimis. I order that all my just debts be paid. Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all my estate, real and personal, which I may die possessed of. Third. I hereby nominate and appoint my friends, Richard Relf and Beverly Chew, my executors, with power to settle everything relating to my estate. New Orleans, 20th May, 1811. Daniel Clark."

That said will, immediately after the making thereof, was placed in the hands of said Richard Relf and Beverly Chew, or one of them, to be used only in case of accident to him on his then contemplated voyage; that a few days after the making of said will, and in the same month of May, the said Daniel Clark departed on his voyage, arrived at Philadelphia in safety, and there found that, although to some extent involved by said Coxe, that his apprehensions were not well grounded; and, after taking measures to prevent future liability with and for said Coxe, he, the said Daniel Clark, returned to New Orleans in the month of July, one thousand eight hundred and eleven; that after that period, the said Daniel Clark, having relinquished active commercial pursuits and public affairs generally, gave his entire care and attention to the husbanding and improving his large estate, and devoted his leisure time to the cultivation of kindly, social relations with his friends, who were devotedly attached to him, and who at all times enjoyed his entire confidence, and amongst whom were the most distinguished and best men of that day. In his intercourse with these friends your oratrix, his daughter and only child, was often and almost constantly a prominent theme of conversation. His recognition of her as his only child, his plans for her proper education as his child and heir to his wealth and good name were subjects well known and appreciated by all who were honored with his intimacy and confidence. He had ceased to have
101 confidence in the fidelity and integrity of his most obliged beneficiaries, the defendants herein, and consequently enjoined secrecy with respect to them upon all those to whom he had communicated his intentions with regard to his estate and his heir. He dwelt with deep feeling of regret upon the train of circumstances which might cast the slightest doubt of the validity of his marriage and the legitimacy of his child, when he should be no longer on earth, to shield her from the foul breath of calumny. He often declared that the said will hereinbefore mentioned and set forth was made to meet an emergency, and that, previous to making it, he had secured to his child the greater portion of his estate; that he should revoke said will, and make another, which should be his last will and testament, in which his child, your oratrix, would be fully and completely recognized as his only legitimate child, born in lawful wedlock of him with the said Zuline née Carriere, and

that he should leave her the undisputed heiress of his entire estate, and that, in pursuance of this, his declared purpose and intention, he, the said Clark, did, as your orator and oratrix are informed and verily believe, and so charge the fact is, some time in or about the month of July, in the year one thousand eight hundred and thirteen, make and execute, in due form according to the then law of Louisiana, his last will and testament, wholly written, dated, and signed by himself, which said will was and is denominated, and by the laws of Louisiana in such case made and provided, an olographic will; that said will was in all respects legal and sufficient for that purpose, and was a full and complete recognition of the legitimacy of your oratrix as his only child; and did bequeath and devise to your oratrix, as his universal heir, all and singular the estate of the said Daniel Clark, both real and personal, charged, however, with certain legacies which are hereinafter particularly set forth; that said will, after its execution, was shown to and opened by, or its contents made known to, several persons, friends of the said Daniel Clark, to wit, the aforesaid Col. Bellechasse, Chevalier Dusuau de la Croix, James Pitot, and Mrs. Harriet Harper, now living, the widow of George Morris Smyth, deceased; that said will, besides the recognition and declaration of the legitimacy of your oratrix, and the devise and bequest to her as aforesaid, directed that an annuity of two thousand dollars per annum should be paid to Mrs. Mary Clark, then of Germantown, the mother of the said Daniel Clark, during her life, an annuity of five hundred dollars per year, to be paid to Caroline de Grange until her majority, when the said annuity was to cease, and the said Caroline was to receive the sum of five thousand dollars as a legacy; that, within one year of the settlement of his said estate, the sum of five thousand dollars should be paid as a legacy to a son of Judge Pitot, then of New Orleans, and, at the same time, the sum of five thousand dollars to a son of Mr. Du Buys, then of New Orleans, as a legacy, and that his faithful slave, Lubur, should be emancipated, and a maintenance provided for him; that said will, when completed by him, after having been shown to his friends as aforesaid, and had been pe-
102 rused, and its contents known by some or all of them, it was placed by said Daniel Clark in a small black case, in which he was known by his most intimate friends to have kept his most valuable private papers; that said Clark stated to sundry persons, and especially to those hereinbefore named, where said will would be found in the event of his death.

That after his death, as your orator and oratrix are informed and believe, when the said will could not be found, and the will of eighteen hundred and eleven was produced by the said Richard Relf, and probate thereof demanded by him, as the last will and testament of said Daniel Clark, the greatest indignation was expressed and felt by the said friends of said Daniel Clark, and others in community, who knew, and who had good reason to believe, and did believe that the said will of eighteen hundred and eleven had been revoked by the said will of eighteen hundred and thirteen, which had been by some person or persons suppressed or destroyed. That dilligent search was made, by the said friends of said Daniel Clark, to find his said will of eighteen hundred and thirteen, without avail.

Your orator and oratrix further show unto your honors that the said Daniel Clark departed this life on or about the sixteenth day of August, one thousand eight hundred and thirteen; and that prior to his making his said last will and testament, in the year one thousand eight hundred and thirteen, he received back from his said friends all or nearly all of

the property, real and personal, which he as aforesaid placed in their hands in trust for your oratrix as aforesaid; that as your orator and oratrix are informed and believe, a short time before the death of the said Daniel Clark the said Richard Relf, having met with affliction in the loss of his wife, he was invited by the said Daniel Clark to reside with him at his house where he then resided, situated in the faubourg St. John, in the city of New Orleans; and that being thus situated, he, the said Relf, during the last illness of the said Daniel Clark, assumed and took upon himself the sole management of the household of said Daniel Clark, and during that time had access to the private office of said Clark in his then said dwelling, and to the papers and documents of every description therein contained; that, as your orator and oratrix are informed and believe, the conduct of said Richard Relf excited general remark and condemnation in the then community of New Orleans, and the deepest indignation, and the worst apprehensions among the most devoted friends of said Daniel Clark; that those friends were solicitous for the state of his health, and often called at his dwelling during his last illness to visit the said Daniel Clark, but were in almost every instance denied admission by said Relf, who sought to allay their apprehensions respecting the condition of the said Clark, by falsely representing to them that he, the said Daniel Clark, was in no imminent danger, but that his physicians ordered that no one should see him; that when often requested by said Daniel Clark to send for one or more of his most faithful friends he, the said Relf, always under various pretences neglected or refused to comply with such request, endeavoring by such means to accomplish and to conceal his iniquitous de-
103 signs to destroy the last will of him, the said Daniel Clark, and to substitute in its place the said will of eighteen hundred and eleven, in which the said Richard Relf knew himself with the said Beverly Chew to have been named and appointed executors; that your orator and oratrix have good reason to believe, and do believe, that immediately after the death of the said Daniel Clark he, the said Richard Relf, having access to the books and private papers of him, the said Daniel Clark as aforesaid, did abstract from the said case or trunk, or from some other place where the same was deposited, the last will and testament of the said Daniel Clark, made in the year eighteen hundred and thirteen, as aforesaid, and did surreptitiously conceal, suppress, or destroy the same, and did substitute in the place and stead thereof the said will of eighteen hundred and eleven.

And your orator and oratrix further show unto your honors that on or about the seventeenth day of August, one thousand eight hundred and thirteen, the said will of Daniel Clark, made in the year eighteen hundred and eleven as aforesaid, was presented to the then court of probates of the city of New Orleans in and for the parish of New Orleans, and was in form probated, and on or about the twenty-seventh day of the same month, letters testamentary were granted unto the said Richard Relf, and that on or about the twenty-first day of January, in the year of our Lord one thousand eight hundred and fourteen, letters testamentary were in like manner granted in the same court unto the said Beverly Chew.

And your orator and oratrix further show unto this honorable court that they are advised, and have good reason to believe, and do believe, that all the proceedings in the said court of probates of the city of New Orleans, for the parish of Orleans, touching the probate of said will, and the granting of said letters testamentary to the said Richard Relf and Beverly Chew, the defendants hereto, are wholly null and void, by

reason of many irregularities and defects in said proceedings, apparent upon the record of said proceedings, and for other causes which can be shown to this honorable court, especially as to the rights and equities of your oratrix herein set forth. And that your orator and oratrix, should they be advised by their counsel that it is necessary, and in the opinion of this honorable court it is competent, for them so to do, will insist upon the fact of the entire and absolute nullity of all said proceedings in said probate court, in the matter of the probate of said will, and granting said letters testamentary, as far as the rights and equities of your oratrix may be affected thereby; and in that case they pray leave to refer to the records of said proceedings, now in the custody of the clerk of the second district court of the city of New Orleans, for greater certainty and to make such other proof aliunde as may be competent and lawful for them to do at all times when the aid of this honorable court, for the purpose of discovery or relief against the said Relf and Chew, defendants, may be invoked by your orator and oratrix, or either of them.

And your orator and oratrix further show unto your honors that the said Mary Clark, the mother of said Daniel Clark, named as de-
104 visee in his said will of eighteen hundred and eleven, was then aged, and resided in the town of Germantown, in the State of Pennsylvania, and that the said Richard Relf and Beverly Chew, in order the more effectually to conceal and accomplish their designs of appropriating the large estate of said Daniel Clark to their own purposes, procured or caused to be procured a power of attorney from the said Mary Clark, bearing date on or about the first day of October, in the year one thousand eight hundred and thirteen, by which they, the said Richard Relf and Beverly Chew, pretend to have been duly authorized and empowered by the said Mary Clark to accept and take possession of for her, and for her sole use and benefit, all and singular the estate of the said Daniel Clark, both real and personal, and to do and perform all acts relating thereto as if she were herself then and there present and acting.

That, under and by virtue of the power and authority pretended to have been conferred by said act of Mary Clark, they, the said Relf and Chew, assumed to take possession of and to accept all and singular the estate or succession of said Daniel Clark, and to act therein in all matters as the said Mary Clark might have done had she been actually present and in person according to law in such case made and provided, accepted of said estate and succession as the instituted and universal heir of said Daniel Clark; but your orator and oratrix are advised and verily believe that the said act of procuration and power of attorney of the said Mrs. Mary Clark to the said Relf and Chew, and which they and each of them accepted and assumed to act, and did act by the authority thereby pretended to have been conferred, is utterly and absolutely null and void, for the uses and purposes therein expressed. That the said Mary Clark could not, by law, accept of said succession and estate by means of third persons thus constituted and appointed, and especially as the said Relf and Chew, prior to their accepting said act of procuration or power of attorney from said Mary Clark, had assumed and entered upon the duties of testamentary executors of said succession or estate, and were at the time of said acceptance of said power of attorney, acting in all respects with regard to said succession or estate as the testamentary executors thereof, claiming to be legally named and appointed and authorized to act in such capacity. That if it had been legally competent for said Mary Clark to accept of said suc-

cession by attorneys or persons thus constituted and interposed, they, the said Richard Relf and Beverly Chew, were wholly incompetent in law, and in view of the antagonistic positions, duties, and relations of the executors of said succession, and the universal devisee thereof, to accept of said procuration, and lawfully to do any act by virtue of its pretended authority; wherefore your orator and oratrix, should they be advised it is proper and necessary, and in the opinion of this honorable court it is competent for them so to do, will insist that all and singular the acts and doings of the said Relf and Chew, and each of them, touching said succession or estate of said Daniel Clark, pretended to have been done under and by virtue of any pretended authority vested in
105 or conferred upon them, or either of them, by said act of procuration of said Mary Clark as to the acceptance of said succession by her, and as to all acts done under her authority or pretended authority thus conferred and expressed, or in any other way or manner conferred or expressed, are absolutely null and void, as far as the same may prejudice or in any manner affect the rights of your oratrix as the sole child and heir at law of said Daniel Clark.

And your orator and oratrix further show unto your honors that they will at all times insist upon the will of said Daniel Clark made in the year eighteen hundred and thirteen, and the suppression thereof, as herein stated, whensoever and wheresoever it may be legally competent for them so to do, except in such cases as such right so to insist is distinctly and expressly waived by them.

And your orator and oratrix further show unto this honorable court that the said Richard Relf and Beverly Chew, or one of them, have at all times acted with regard to the said succession of the said Daniel Clark, and especially in the disposition of the property named in the schedule hereinbefore referred to and annexed, either in their said assumed twofold capacity of executors of the said estate or succession, and as attorney or attorneys in fact of the said devisee, or in either capacity, as their pleasure, humor, caprice, or convenience might dictate, without the least regard being had on their part to the duties, forms, ceremonies, or solemnities which the laws of Louisiana imposed on and prescribed for them as such executors, or even the obligations which they owed to the said Mary Clark as devisee. That the sales of the said real and personal estate and rights and credits, or any other disposition whatsoever which has been made of the same or any part thereof were each and every of them made without any shadow of authority conferred by the law, and without any necessity to meet the exigencies of said estate.

That your orator and oratrix are informed, and have good reason to believe, and do believe, that all or the greater portion of said property, real, personal, and slaves, and more especially the real estate and slaves were sold at private sale by said Richard Relf and Beverly Chew, or one of them, wholly contrary to the laws of Louisiana in such case made and provided, and then in full force and effect, which positively prohibited all sales of the property of successions in any other manner than at public auction. That there was never shown by said Relf and Chew, or either of them, any good or sufficient cause for selling any portion of said real estate or slaves, and that no such cause did exist, for the reason that the money and available credits and other personal property of the said Daniel Clark, which he left at his death, was more than adequate to pay all and singular the debts, obligations, and liabilities of every description or nature whatsoever with which his said succession could have been lawfully charged; and so your orator and oratrix

believe it would manifestly appear if the said Relf and Chew could be compelled to make a full and honest accounting of all and singular the moneys, book accounts, notes, bonds, mortgages, stocks, rights, and credits and personal property of every name, description, or
106 kind which has come into the possession of them, or either of them, as lawfully belonging to the said estate or succession of said Daniel Clark.

And your orator and oratrix further show unto your honors that the said Mary Clark, the mother of said Daniel Clark, departed this life on or about the ninth day of June, in the year of our Lord one thousand eight hundred and twenty-three, at Germantown, in the State of Pennsylvania aforesaid, and that she left her last will and testament, in which she named as her heirs and devisees her three daughters, to wit, Mrs. Eleanor O'Bearne, then of Sligo, Ireland, Mrs. Jane Green, of Liverpool, England, wife of George Green, and Mrs. Sarah Jane Campbell, then and now of Germantown aforesaid; also Mrs. Caroline, born Des Granges, then of Philadelphia, late wife of Dr. John Barnes, each to share alike one equal undivided fourth part of all her estate, real and personal; that in said will Joseph Reed and William E. Hulings, of the city of Philadelphia, were named executors thereof. That said will was probated in the State of Pennsylvania, and letters were in form granted unto the said Joseph Reed, but that the said William E. Hulings declined acting as executor, and was never qualified according to law; and the said Joseph Reed at all times refused to discharge the duties of an executor of said estate, except as to such portion of said estate as was found by him in the State of Pennsylvania.

And your orator and oratrix further show unto your honors that your orator and oratrix are informed and verily believe that the said Relf and Chew, after the death of the said Mary Clark, did actually dispose of a considerable portion of the real estate and credits, and other property mentioned in the schedule hereunto annexed, and other property belonging to the estate of said Daniel Clark, under the pretence of the authority pretended to have been vested in them by the said act of procuration or power of attorney of the said Mary Clark aforesaid, in the same manner as during the life of said Mary Clark. Wherefore your orator and oratrix submit to this honorable court and charge that said acts of said Relf and Chew, after the decease of her, the said Mary Clark, touching anything relating to the said succession of said Daniel Clark, are wholly void as to your oratrix.

And your orator and oratrix further show unto this honorable court that they are informed and believe that the said Relf and Chew further pretend that they, and each of them, after the death of said Mary Clark, acted in all things, touching the said property belonging to the succession of said Daniel Clark, by virtue and under the authority of an act of procuration made by said Joseph Reed, of Philadelphia, pretended executor of the last will and testament of said Mary Clark, authorizing and empowering them, and each of them, to act in all matters and things in relation to said succession of Daniel Clark, which was claimed as a part of the estate or succession of said Mary Clark, which she left at her death, but your orator and oratrix submit to this honorable court that all and singular the acts and doings of said Relf
107 and Chew, or either of them, affecting in any manner the succession of said Daniel Clark, or any part thereof, under the pretended authority of the said act of procuration or power of attorney, made by said Joseph B. Reed to them, are utterly void and of no effect as to the claims and pretensions of your oratrix, as the sole heir-at-law of said

Daniel Clark, or as his instituted universal heir by the said will of him, the said Daniel Clarke, made in the year eighteen hundred and thirteen, as is herein set forth.

And your orator and oratrix further show unto this honorable court, and charge the fact to be so, that your oratrix was born on or about the day of July, one thousand eight hundred and six, in the city of New Orleans aforesaid. That immediately after her birth she, your oratrix, was placed in the family of Samuel B. Davis, then residing in the said city of New Orleans, and was under the care and supervision of the said Samuel B. Davis and Mrs. Mary Ann Rose Davis, his wife, and so remained during the lifetime of the said Daniel Clark, and that during that period she was always known and called in the family of said Davis as Myra Clark.

That a few months prior to the death of the said Daniel Clark, to wit, in the year one thousand eight hundred and twelve, the said Samuel B. Davis removed from the city of New Orleans to the city of Philadelphia, to reside permanently, and that at the particular instance and request of the said Daniel Clarke, he, the said Samuel B. Davis, took with him your oratrix. That your oratrix from and after the death of her father, the said Daniel Clarke, was called and known by the name of Myra Davis, and was kept in entire ignorance of her true name and parentage until some time in or about the year one thousand eight hundred and thirty-two, and a short time prior to her marriage with William Wallace Whitney, then of the State of New York, dedeased.

That at or about the time of her said intermarriage with the said William Wallace Whitney as aforesaid, he, the said Samuel B. Davis, and others, made a full disclosure to your oratrix and her then husband, the said Whitney, of her real name, parentage, and history, and, as far as was known to them, the extent, nature, and condition of her just rights, of which she had been so unjustly deprived, and of which, until that time, from the profound secrecy in which they had been involved with regard to her, she was without the means or opportunity of possessing herself.

That as far as was in their power so to do, as your oratrix was assured by them, those who had assumed the care and education of your oratrix, and whom she had ignorantly supposed to be her parents, and others who to the period of the aforesaid had been in possession of the secret with regard to the history of your oratrix and her rights, did furnish your oratrix and her then husband with information respecting the same, and proffered such aid as was in their power, and consistent with truth and justice, to enable your oratrix and her said husband to acquire her said rights, and to redress the wrongs and injuries which had been so cruelly inflicted upon your oratrix.

108 That, having obtained such information as they were enabled to do in the city of Philadelphia aforesaid, your oratrix and her then husband, the said William Wallace Whitney, went to the city of New Orleans, some time in or about the year of our Lord one thousand eight hundred and thirty-four, and then and there adopted and vigorously prosecuted such means and measures as they were advised by their then counsel were competent and necessary, in order to be put into the possession of the estate or succession of her father, the said Daniel Clark, which legally and equitably belonged to her, as well in her right as his sole heir-at-law as in her right and capacity of instituted heir of the said Daniel Clark by his said will of the year one thousand eight hundred

and thirteen, which your oratrix had been informed, and as your orator and oratrix now believe, has been destroyed or concealed and suppressed.

That the immense estate left by her father, the said Daniel Clark, and then in the possession of said Relf and Chew, and a large number of individuals of great wealth and high standing, who had unlawfully held said estate from the said Relf and Chew, opposed to your oratrix and her then husband so powerful a combination that but for the sincere confidence which they conscientiously felt in the truthfulness and justice of her cause, they would not have dared to promise themselves success.

They believed that neither the means were wanting for the purposes of corruption nor the will and disposition on the part of the said Relf and Chew, and their confederates, to use the means for said purposes.

That your oratrix and her then husband, the said Whitney, instituted various proceedings in the tribunals of the State of Louisiana, under the advice of their then counsel, for the purpose of obtaining her rights; amongst others, for the purpose of annulling the probate of the said revoked will of one thousand eight hundred and eleven, and of establishing, or giving effect to the said last will and testament of said Daniel Clark, of the year one thousand eight hundred and thirteen; but so great and over powering was the combination of wealth and influence which it could command, which was brought against them, and so numerous were the confederates of said Relf and Chew, and many of them, too, in high places, that your oratrix and her then husband were advised so to do, and did altogether abandon several of the suits and proceedings which they had so instituted, and others, especially those instituted for the purposes of giving effect to said will of said Daniel Clark, of 1813, were suspended, in order to invoke such aid as this honorable court is competent to afford in the premises. That on or about the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and thirty-six, your oratrix, with her then husband, the said William Wallace Whitney, as complainants, filed the bill of complaint in this honorable court against the said Relf and Chew, and others holding portions of the estate of said Daniel Clark, for the purpose of obtaining such discovery and relief as to this honorable court should seem meet and proper to
109 afford; amongst other matters to declare your oratrix to be the legitimate and only child of the said Daniel Clark, deceased, born in lawful wedlock of the said Daniel Clark with the said Zuline, nee Carriere; that the said will and testament, made by said Daniel Clark in the year eighteen hundred and eleven, had been revoked by the said Daniel Clark by his said last will and testament of the year eighteen hundred and thirteen, which had been surreptitiously destroyed or concealed and suppressed as charged in said bill, and to give due force and effect to said suppressed will, as though the same had been duly exhibited in and probated by the proper forum in the State of Louisiana, constituted by law for that and such *such* like purposes, and for an accounting on the part of said Relf and Chew, and their confederates, of such property and effects, rights, credits, revenues, issues, rents, or profits belonging to or derived from the said estate or succession of said Daniel Clark, claimed by your oratrix, as had at any time come into the possession of said Relf and Chew and their confederates, or either of them.

That demurrers to said bill of complaint were filed by several of the defendants, which demurrers were finally argued in the Supreme Court of the United States, and were there overruled, but your orator and oratrix were required to amend said bill in two particulars, to wit, that the said Caroline, born Desgranges, being a devisee or legatee in the said will of

1813, should not be made a party to said bill for the purpose of establishing said will; also that the said Relf and Chew, who had disposed of said estate as pretended executors as aforesaid, could not be required to account by the same bill in which the said defendants who held portions of said estate of Daniel Clark were parties.

That your orator and oratrix have caused this said bill of complaint in this honorable court to be amended in accordance with the said suggestions and requirements of the Supreme Court, and that said suit is now herein pending on said bill, as amended.

And your orator and oratrix further show unto your honors that the said William Wallace Whitney, the former husband of your oratrix aforesaid, departed this life on day of , in the year one thousand eight hundred and thirty-seven. That on the day of 1839, your orator and oratrix were united in marriage. That on the twenty-fourth day of May, 1839, by a supplemental bill, filed in this honorable court for that purpose, the said suit was thereupon ordered to be prosecuted in the names of your orator and oratrix as complainants, and the said suit is thus pending. And your orator and oratrix further show unto your honors, that your orator and oratrix were hindered and embarrassed in the prosecution of said suit by various frivolous demurrers and pleas, which avoided answering to the merits of said cause, interposed by the said Relf and Chew and several of their confederates, until Charles Patterson, one of the defendants named in said bill, withdrew his dilatory proceedings and filed his answer to said bill, and consented that said cause should be brought to a hearing in this honorable court upon its merits, after the testimony in favor of your oratrix had been published, and after all the testimony which
110 could be had on the part of the defendants was duly filed and published in said cause. That upon such hearing a decree was rendered in this honorable court, amongst other matters therein decreed declaring your oratrix to be the lawful and sole heiress of the said Daniel Clark, and that the defendant charged Patterson should be required to deliver up to your orator and oratrix all and singular that portion of the estate of said Daniel Clark unlawfully held in manner aforesaid by him, the said Patterson. That the said Charles Patterson appealed from the said decree of this honorable court to the honorable the Supreme Court of the United States, whereupon, after hearing of said appeal, the said Supreme Court, at the December term thereof, held at the city of Washington, in the year of our Lord one thousand eight hundred and forty-seven, did adjudge, order and decree that it be adjudged and declared, upon the evidence in the cause, that a lawful marriage was contracted and solemnized at Philadelphia, in the State of Pennsylvania, between the same Daniel Clark in the said bill and proceedings mentioned, and the same Zulime Carriere in the said bill and proceedings mentioned; and that Myra Clark, now Myra Clark Gaines, and one of the complainants in said cause, is the lawful and only issue of the said marriage, and was at the death of her said father, Daniel Clark, his only legitimate child and heir at law, and as such was exclusively invested with the character of his forced heir, and entitled to all the rights of such forced heir. And further, the said court did order, adjudge and decree that all and singular the property described and claimed by the defendant Patterson, in his answer and supplemental answer, and in the exhibits thereto annexed, is part and parcel of the property composing the said succession of the said Daniel Clark. That the said defendants, Richard Relf and Beverly Chew, at the time and times when, under the pretended authority of the testamentary ex-

ecutors of the said Daniel Clark and of attorneys in fact of the said Mary Clark in the bill and proceedings mentioned, they cause the property so described and claimed by the defendant Patterson to be set up and sold at public auction in December, 1820, and where they executed their act of sale, dated the eighteenth of February, eighteen hundred and twenty-one, to Gabriel Conejolles, for the two lots therein described (which two lots constituted the same property described and claimed by the defendant Patterson aforesaid), had no legal right or authority whatsoever so to sell and dispose of the same, or in any manner to alienate the same. And the said court did further order, adjudge, and decree that all the property claimed and held by the defendant Patterson, as aforesaid, remained unalienated and undisposed of as part and parcel of the succession of the said Daniel Clark, notwithstanding such sales at auction and active sale in the pretended right or under the pretended authority of the defendants, Relf & Chew. And the said court did further order, adjudge, and decree that the complainant Myra Clark Gaines is justly and lawfully entitled, as the only forced heir of Daniel Clark, to her legitimate portion of four fifths of the said succession, and to have four fifths of the property so claimed and held by the defendant Patterson, as aforesaid,
111 duly partitioned, apportioned, and delivered or paid over to her, together with four-fifths of the yearly rents and profits accruing from the same since the same came into the said defendant's possession. All which will more fully and at large appear by reference to a duly authenticated copy of said decree on file in said suit with the clerk of this honorable court, and to which your orator and oratrix pray leave to refer, and that the same may be made a part of this their bill of complaint, and that they may have the full benefit and advantage thereof, as a final and conclusive adjudication of the position and rights of your oratrix, against the claims and pretensions of the said Relf and Chew, and all those holding under them, any part or portion of said succession of said Daniel Clark, deceased, as far as it may be competent for this honorable court to give force and effect to said decree. And your orator and oratrix further show unto this honorable court, and they charge the fact so to be, that a large proportion of the real estate mentioned and described in the schedule hereunto annexed, at the time when it came into the unlawful possession of said Relf and Chew, as set forth in this bill, and until it was unlawfully disposed of by them, as also set forth *by* herein, was in a productive condition, and yielded a large annual revenue or income, in rents, issues, and profits, and that the revenues and profits derived from the hire or labor of all and singular the slaves named in said schedule amounted to a large sum annually, all of which said revenues, rents, and issues, profits, hire, and labor, amounting in all, as your orator and oratrix believe, to more than one hundred thousand dollars, came unlawfully into the hands of said Relf and Chew, or one of them, and were by them, or one of them, appropriated unlawfully and fraudulently to their own purposes, or otherwise; wherefore your orator and oratrix submit to this honorable court, and as they are advised by their counsel they charge, that the said Relf and Chew are, and each of them is, liable to answer unto your oratrix as implied trustees to the full amount of said revenues, rents, issues, profits, hire and labor, together with the lawful interest thereon, from the time or times when the same came into their hands, for her sole use, benefit and advantage, and ought to pay over to her, as the forced heir of said Daniel Clark, four-fifths thereof, as a part of the said suc-

thereof, in case your orator and oratrix shall be able, by the aid of cession of her father, the said Daniel Clark; and the whole amount this honorable court, or otherwise, to establish the right of your oratrix to the entire succession of the said Daniel Clark as universal heir and devisee, instituted and named in said will of said Daniel Clark, made by him in the year one thousand eight hundred and thirteen, suppressed, concealed, or destroyed as herein charged, and shall be enabled to enforce said will, and acquire all the benefits and advantages conferred thereby, in the same manner and to the same extent as if the same had been formally probated and established instead of the will of the said Daniel Clark of the year eighteen hundred and eleven, as herein set forth.

And your orator and oratrix further show unto your honors that they are informed and believe, and from such information and belief
112 they charge the facts so to be, that all or the greater portion of the said debts, stocks, notes, bonds, mortgages, and other rights and credits due to and belonging to the succession of the said Daniel Clark, and enumerated and named in the said schedule hereunto annexed (which, however, your orator and oratrix have good reason to believe does not embrace all the said debts, rights, and credits due to and belonging to the said succession,) which came into the hands of the said Relf and Chew, were collected by them, and the avails of them, amounting to several hundred thousand dollars, was appropriated by the said Relf and Chew in an unlawful and fraudulent manner to their own or other unlawful purposes. And that as to the entire amount of such avails, the said Relf and Chew, and each of them, are answerable to your oratrix in the same capacity and relation as aforesaid, of implied trustees, to the entire amount thereof, together with the lawful interest thereon from the time or times the same came into their hands, or the hands of either of them, to the sole use and benefit of your oratrix as forced heir, or as devisee as aforesaid.

And your orator and oratrix further show unto your honors, and so they charge the fact is, that personal property of great value, a portion whereof is embraced and enumerated in the schedule hereunto annexed, consisting of slaves, farming stock, animals of various kinds, farming utensils, household furniture, rare plants and shrubs, books, pictures, ornaments, plate, and other articles of great value, belonging to the succession of said Daniel Clark, came into the possession of said Relf and Chew, and were all and singular of them sold or disposed of by said Relf and Chew in an unlawful manner, and the avails or proceeds thereof disposed of by them unlawfully and fraudulently; and as to the entire amount of such avails and proceeds, they, the said Relf and Chew are, and each of them is, as your orator and oratrix are advised, answerable to your oratrix in the like capacity or relation as aforesaid, of implied trustees, for the sole use and benefit of your oratrix as forced heir, or as devisee of the said Daniel Clark, as aforesaid, as also to the entire amount of the lawful interest upon said avails or proceeds from the time or times when the same came into their hands as aforesaid, and ought to be required by this honorable to pay over said amount to your oratrix, either to the extent of her legitimate portion as forced heir or the entire amount as devisee as aforesaid.

And your orator and oratrix further show unto your honors, and so charge the fact is, that your orator and oratrix have at all times hitherto been wholly unable to obtain possession of the books and papers belonging to the said Daniel Clark in his lifetime, which, as your orator and oratrix believe, contain an entire and a complete

history of all his transactions, and would afford to your orator and oratrix full information of the nature, extent, and value of his succession; that the said Relf and Chew have at all times refused to give to your orator and oratrix free access to said books and papers, and have at all times refused to give to them any satisfactory account or information respecting the same or the contents thereof.

That it is true that a very considerable portion, as your orator
113 and oratrix believe, of said books and papers were, for a short time, left with the then clerk of the late probate court in and for the parish of Orleans, pending a controversy between the said Relf and Chew and the devisees of the said Mrs. Mary Clark; but subsequently, without the knowledge or consent of your orator and oratrix, or either of them, and by collusion with the said devisees of said Mary Clark, or otherwise, the said books and papers were returned to the possession of said Relf and Chew, or one of them. That your orator and oratrix have good reason, and they do apprehend, that many books and papers of great value to your oratrix, and which, if placed within her control, to be exhibited to this honorable court, would establish beyond further controversy or question her pretensions and claims as herein set forth, have been concealed, suppressed, or destroyed by the said Relf and Chew, or one of them, or by some one, by their instigation; but that there are now in the hands of said Relf and Chew, or one of them, or under their control, books and paper which, if exhibited in this honorable court, would not only establish her legitimacy as the sole child and heir of the said Daniel Clark, but also enable her to recover all, or the greater portion, of his estate or succession, of which she had been in manner aforesaid fraudulently and corruptly deprived.

That the said Daniel Clark, at the time of his death, left real estate of great value, which belonged to him in his own right as lawful and rightful owner, situated in several of the now most important States of this Union, to wit: Illinois, Kentucky, Ohio, Alabama, and elsewhere, which the said Relf and Chew never pretended to dispose of or exercise any authority over as executors as aforesaid of said Daniel Clark, and which now belongs to your oratrix entire, of right, as the sole legitimate child and heir at law of said Daniel Clark, and which your oratrix might be able to recover if she were in possession of or had free access to the said books and papers of said Daniel Clark, but which without such aid your orator and oratrix have reason to fear, and do apprehend, will be forever lost to her. That your orator and oratrix have been particularly informed that the said Daniel Clark, at the time of his death, possessed in his own right a legal title or claim to lands in the then Territory, now State of Illinois, which was valued as early as about the *the* year one thousand eight hundred and thirty, by a competent person to judge of its value, at about eighteen thousand or twenty thousand dollars, which said land, from the rapid increase of wealth and population in said State since the date aforesaid, your orator and oratrix believe is of immense value; but your orator and oratrix, from being denied an inspection of the books and papers of said Daniel Clark, have hitherto been unable to discover and prosecute the just claims of your oratrix as aforesaid to said lands, and unless the said books and papers are immediately placed within reach of your orator and oratrix, the said land will be utterly lost to your oratrix, if, in truth, the same is not already lost to her.

And your orator and oratrix further show unto this honorable court, that the said Relf and Chew, and each of them, have been
114 requested by your orator and oratrix, or by their friends in their behalf, in a friendly and amicable manner to come to an account-

ing with your orator and oratrix of and concerning all and singular the matters herein set forth, touching the disposition of the personal estate, rights, and credits belonging to the succession of the said Daniel Clark, as herein set forth; and to surrender and pay over to your oratrix the proceeds of said real and personal estate, according to her legal rights to her legitimate portion or the whole thereof, as herein set forth, and to allow your orator and oratrix, or some one in their behalf, to have free access to the said books and papers of the said Daniel Clark for the lawful purposes herein set forth. But now so it is that the said defendants, Richard Relf and Beverly Chew, combining and confederating with divers persons at present unknown to your orator and oratrix, whose names, when discovered, your orator and oratrix pray they may be at liberty to insert herein with proper and apt words, and charge them as parties and defendants hereto, and contriving how to wrong and injure your orator and oratrix in the premises, absolutely refuse to comply with such reasonable request of your orator and oratrix; and they pretend that your oratrix is not the daughter of the said Daniel Clark, and that if she is his daughter, that the said Daniel Clark and the said Zuline, nee Carriere, were never lawfully united in the bonds of matrimony, and that the said Zuline, nee Carriere, at time of her said marriage with the said Daniel Clark, as herein charged, was the lawful wife of one Jerome Desgrange; whereas your orator and oratrix aver the contrary of all such pretences to be true, and that your oratrix is the only child of said Daniel Clark, and the legitimate offspring of the lawful marriage of said Daniel Clark with said Zuline, nee Carriere, as hereinbefore stated; and the said defendants further give out and pretend that the said Daniel Clark never did make a will and testament in the year one thousand eight hundred and thirteen, as stated herein, and that if such will was made, said will of the year one thousand eight hundred and eleven was lawfully probated, and that all and singular the acts and doings of said defendants, under the authority conferred by said will in regard to the disposal of said succession of said Daniel Clark, were legal, and done in all respects according to law; the contrary of which pretences your orator and oratrix aver and charge to be the truth; and at other times the said defendants pretend that they, and each of them, have fully accounted concerning all and singular their acts and doings touching the succession of said Daniel Clark, in the late probate court of the city of New Orleans in and for the parish of Orleans, and that their account has been finally homologated in said court by the judgment and decree thereof, and that they, and each of them, the said defendants, are forever absolved from all liability to answer to your orator and oratrix, or to any other person or persons touching the disposition of said succession of Daniel Clark; whereas the contrary of all said pretences your orator and oratrix aver to be the truth, and that if such accounting shall be made to appear, and the said decree and judgment of homologation shall be set up
115 and interposed to the just claims of your oratrix herein set forth, the same is wholly null and void as your oratrix and her just rights in the premises.

And the said defendants further pretend that the said Daniel Clark was at his death indebted to sundry persons and corporations in a large amount, and that the avails or proceeds of said rights and credits and personal estate was justly applied to the discharge of the just debts and liabilities of said succession; whereas your orator and oratrix aver the contrary of such pretences to be true, and that the said Daniel Clark at his death was, if at all, only indebted in a very small amount, and that said personal property, rights, and credits, if rightfully and lawfully

disposed of. would have yielded or produced a large sum over and above the amount of all the just debts, liabilities, and claims against the said succession of Daniel Clark, as your orator and oratrix verily believe; and the said defendants further pretend that they, and each of them, were co-partners in trade and commercial enterprise with said Daniel Clark, and in this relation were entitled each to one equal one third part of all and singular the property found in the succession of said Daniel Clark, with some few exceptions; and that, in proof of said co-partnership. the said Relf and Chew claim to hold a written contract of agreement purporting to have been entered into by and between the said Daniel Clark and them, the said Relf and Chew, within two months prior to the death of said Daniel Clark; whereas your orator and oratrix aver the contrary of all such pretences to be true, and that if any such pretended contract or agreement shall be presented by the said defendants in this honorable court, the same (if it shall appear to have been truly executed by said Daniel Clark, which your orator and oratrix expressly denies), is of no legal or equitable force or effect for the uses and purposes thereby pretended by the said Relf and Chew to have been designed. All of which actings and doings of the said Relf and Chew are contrary to right, equity, and good conscience, and tend to the manifest wrong, injury, and oppression of your orator and oratrix; in tender consideration whereof, and forasmuch as your orator and oratrix are remediless in a court of law, and for that your orator and oratrix have no ordinary way or means by the ordinary course of the common law to enforce the said defendants, Richard Relf and Beverly Chew, or either of them, to exhibit to your orator and oratrix the books and papers of the said Daniel Clark, in order that your oratrix may be informed respecting the entire nature, extent, and value of the succession of her father, the said Daniel Clark, of right belonging to and claimed by your oratrix herein, the amount of the personal property, rights, and credits, and choses in action belonging to, and the debts and liabilities existing against said estate or succession; and further, that she may possess all necessary information for the successful prosecution of her rights as herein particularly set forth, but is altogether destitute of the means to have an inspection of said books and papers, and an accounting by said Relf and Chew, and each of them, respecting all and singular their actings and doings, and requiring them, and each of them, to pay over or secure to your oratrix whatsoever may
116 be found, upon such accounting, to be justly and equitably due to your oratrix, according to her just rights as herein set forth, except by the aid and assistance of this honorable court, where matters of this kind are properly cognizable and relievable.

To the end, therefore, that the said Richard Relf and Beverly Chew, and each of them may, if they can, show why your orator and oratrix should not have the discovery and relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

Interrogatory 1. Whether the said Daniel Clark, in this bill mentioned, did not leave, at his death personal property of large amount and value, all of which came into the hands of the said Relf and Chew, or under their control, or one of them, consisting of slaves, farm stock, animals of various kinds, farming utensils and implements of husbandry, book

accounts, notes, bonds, mortgages, stocks, debts due and to become due, household furniture, pictures, plate, books, ornaments, plants and shrubs, carriages, and other articles of personal property, chattels, and choses in action. If yea, what is the name or kind of each article of said personal property or chattel, the name, age, and sex of each slave, the name, description, and amount of each item of the debts due to said Clark, or of the choses in action, and whether all and what portion of said debts and choses in action was collected by the said defendants, and at what time were said debts, and each of them, or any, and what part thereof, received by said Relf and Chew, or either of them, or by any other persons for them? that they may set forth these matters particularly.

Interrogatory 2d. Whether all or any part of said personal property was disposed of by said Relf and Chew, or either of them. If yea, when? In what manner, and to whom, and how was the avails or proceeds thereof applied? and how was the proceeds of said debts or choses in action applied? that they and each of said defendants may file all receipts and other vouchers for the disposition of said property by them or either of them, with their answer hereto, or produce them in this honorable court as it shall direct.

Interrogatory 3d. Whether the property, real and personal, and slaves, rights and credits, and choses in action, specified in the schedule filed herewith, was a part of the succession of the said Daniel Clark, when the same came into the possession or under the control of said defendants, or either of them, as a part of said succession or estate; and whether said schedule embraces all of the property belonging to said succession which came into the hands or under the control of the said Relf and Chew, or either of them; and whether the said schedule embraces all the property of said succession of which the said Relf and Chew had or have any knowledge, information, or belief. If not, where was, or is any other property belonging to said succession of which
117 the said defendants, or either of them, have or has any knowledge, information, or belief.

Interrogatory 4th. Whether any and what particular portion of the real estate, wheresoever situated, which belonged to the said succession of said Daniel Clark, and came into the possession or under the assumed control of said defendants, or either of them, was productive or yielded a revenue in rents, or issues, or profits. If yea, what portion or piece of said real estate, whether named in the said schedule or not, produced or yielded such revenue? What was the amount of such revenue, and in what particular manner produced, yielded, or derived? whether by rents, issues, and profits? and when was or were such revenue or revenues received or realized by the said Relf and Chew, or some one for them, and by whom paid, and how was the same applied?

Interrogatory 5th. Whether the slaves belonging to the estate or succession of said Daniel Clark, which came into the hands or under the control of said Relf and Chew, or either of them produced any revenue by their labor, hire, or otherwise, which came to the hands of said Relf and Chew. If yea, what amount, from whom received, and when?

Interrogatory 6th. Whether there were any debts due and owing by the said Daniel Clark, or obligations or liabilities incurred by him individually during his life, and which were charged or chargeable upon his estate or succession, which came into the possession of the said Relf and Chew, or either of them. If yea, what was the nature and amount of such debts, obligations, and liabilities, respectively? To whom were

they and each of them respectively due and owing? whether they, or either, and which of them were or was a charge upon any particular portion of said estate, real or personal, by way of mortgage, or privilege, or otherwise?

Interrogatory 7. Whether the said personal estate of the said Daniel Clark, which came to the hands of the said defendants, or one of them, was not sufficient, or more than sufficient, to pay all and singular the just debts of the said Daniel Clark which were justly charged or chargeable upon his said succession.

And your orator and oratrix further pray that, by the order and decree of this honorable court, your oratrix, the said Myra, may be adjudged, declared, and decreed, as she has already by this honorable court, and by the Supreme Court of the United States, been adjudged, declared, and decreed to be the legitimate child and sole heir at law of the said Daniel Clark, born in lawful wedlock of the said Daniel Clark with the said Zuline nee Carriere; that said marriage between said Daniel Clark and the said Zuline was duly solemnized at the city of Philadelphia, in the State of Pennsylvania, according to law, and was a legal and valid marriage in all respects, and carried with it all the consequences and benefits of a legal marriage to your oratrix, the sole offspring and issue of said marriage; that it may be further ordered, adjudged, and decreed by this honorable court that the said Daniel Clark did make and execute his last will and testament, bearing date
118 in the year one thousand eight hundred and thirteen, as charged herein, which said will was, in due form of law, an olographic will, and was a complete revocation of any former will or wills before that time made by the said Daniel Clark, in which said will your oratrix was declared to be the legitimate child and heir at law of the said Daniel Clark, and that said will was unlawfully and surreptitiously concealed and suppressed or destroyed by some person; and that your oratrix may now have, notwithstanding the suppression or destruction of said will, the full and entire rights, benefits, and advantages designed by her said father, the said Daniel Clark, to be secured to her as far as it is competent for this honorable court to adjudge to her such rights, benefits, and advantages; and in the event that in the opinion of this honorable court, it shall be deemed incompetent and inconsistent with the powers conferred upon your honors to grant unto your oratrix the full benefit of said will of eighteen hundred and thirteen, as herein prayed, that then your oratrix may, by the order and decree of this honorable court, be adjudged, declared, and decreed to be lawfully and equitably entitled to her legitimate portion of the said personal property, rights, and credits belonging to the succession of the said Daniel Clark, or the proceeds and avails thereof, which came into the hands of the said Relf and Chew, or either of them, as the forced heir of the said Daniel Clark; and that, as to this portion, or her legitime of the said succession, the said Relf and Chew, and each of them, were and are in equity implied trustees for the use and benefit of your oratrix, notwithstanding the said will of said Daniel Clark made in the year one thousand eight hundred and eleven; and that all and singular the acts and doings of the said Relf and Chew, or either of them, under the authority pretended to have been conferred by said will, are wholly null and void as respects the rights of your oratrix to her said legitimate portion of said succession; and that the said Relf and Chew may, and each of them be required, by the order and decree of this honorable court, to render an account with your oratrix, in this honorable court, of all and singular the personal property, slaves, stock, book accounts, notes,

bonds, mortgages, and all chattels, choses in action, rights and credits, and the avails, or proceeds thereof, which came to the hands of said Relf and Chew, or either of them, and the revenues, rents, issues, and profits derived by the said real estate and slaves, as a part of the succession of said Daniel Clark; and that they may be required to pay over to her the proportion of four-fifths thereof, with all the lawful interest which has accrued or may accrue thereon; and that your oratrix may have execution thereof, and that, upon rendering such account, the said Relf and Chew, and each of them, may be required to produce all the books from which such accounts are taken, and all the vouchers for the payment or disposition of all moneys pretended to have been paid by them, or either of them, for or on account of the succession of said Daniel Clark.

And that the said Relf and Chew, and each of them, may be required by this honorable court to set forth particularly all the debts and
119 liabilities due and owing by, and charged, or chargeable upon the said succession of Daniel Clark, and to whom were such debts and liabilities due and owing, respectively, and what was the nature of such debts and liabilities, whether as principal or surety, individually and singly, or jointly or in solido, and with whom.

And that the said Relf and Chew, and each of them, may be required by the order of this honorable court to deliver up, under the direction of this honorable court, into the custody of the clerk thereof, all books, papers, writings, and memoranda of every description which came into the possession of either of them, belonging to the late Daniel Clark, and that the same may be at all times subject to the inspection of your orator and oratrix, and that after the accounting of said Relf and Chew, as herein prayed, shall have been completed, that said books and papers, and all and singular thereof, shall be adjudged and decreed to be the sole property of your oratrix, except such as may of right belong to said Relf and Chew, or either of them, as their proper vouchers.

And that the said Relf and Chew, and each of them, may set forth and discover, according to the utmost of their respective knowledge, information, and belief, whether any property belonging to the estate or succession of said Daniel Clark remains which has not been disposed of by them, where the same is situated, and all the facts and circumstances connected therewith. And that the rights and equities of your oratrix are in no way or manner prejudiced by any power or authority pretended to have been conferred by the said Mary Clark by reason of her act of procuration or power of attorney to said Relf and Chew, nor their acts under and by virtue of said pretended power and authority. And that your orator and oratrix may have such further and other relief in the premises as the nature and circumstances of this case may require and shall seem meet to this honorable court.

May it please your honors to grant unto your orator and oratrix a writ of sequestration to be directed to the said Richard Relf and Beverly Chew, commanding them, and each of them, to deliver up to the marshal of the United States within and for the district of Louisiana all and singular the books, papers, and writings of every description belonging to the said Daniel Clark in his lifetime, and which after his death at any time came into the hands or under the control of them, or either of them, to be placed in the custody of the clerk of this honorable court, that your orator and oratrix may at all times have free access thereto, and that the said Relf and Chew, and each of them, or their attorneys, counsellors, solicitors, or agents may have free access to such

books and papers for the purpose of rendering the account herein prayed.

May it please your honors to grant unto your orator and oratrix a writ of subpœna, to be directed to the said Richard Relf and Beverly Chew, thereby commanding them, and each of them, by a certain day and under a certain penalty therein to be inserted, personally to appear in this honorable court, and then and there full, true, and perfect answer make to all and singular the premises, and further, to stand to and abide
120 by and perform such further order, direction, and decree therein as to this honorable court shall seem meet. And your orator and oratrix will ever pray.

P. C. WRIGHT,
Solicitor for Complainants, of Counsel.

NOTE.—The defendants are each of them required to answer the interrogatories herein propounded numbered 1, 2, 3, 4, 5, 6, 7.

P. C. WRIGHT,
Compl'ts' Sol.

* * * * of this suit and other suits and rights in the foregoing bill set forth, and that without such inspection it is impossible to prosecute the claims of said complainants in this bill set forth, and irreparable injury would thereby result to said complainants, as this deponent has good reason to believe, and from information does believe. And further deponent saith not.

P. C. WRIGHT.

Sworn before me this 16th day of December, 1848.

ED. RANDOLPH, *Clerk.*

Schedule A.

1st. One valuable plantation, parcel, or tract of land, situated in the parish of , in the 1st district, in the State of Louisiana, about five leagues above the city of New Orleans, on the left bank of the river Mississippi, and bounded on the upper side by lands owned or possessed in the month of October, 1813, by one William Kenner, and on the lower side by lands which were owned or possessed in said October, 1813, by Jaques Fortier, and extending on both sides to Lake Pouchatrain, with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, being the same plantation, piece, or parcel of land which was purchased by the said Daniel Clark, in his lifetime, of one Stephen Henderson for the sum of one hundred and twenty thousand dollars.

2d. A tract, portion, or square of land situated in the suburb St. Mary, of the said city of New Orleans, being the square of ground in said suburb, bounded on one side by Phillippa street, on the second side by Poydras street, on the third side by Circus street, and on the fourth side by Perdido street, and measuring on Phillippa street three hundred and eighteen feet, more or less; on Poydras street one hundred and seventy-nine feet six inches, more or less, on Circus street three hundred and forty-six feet, more or less, and on Perdido street two hundred and eleven feet six inches, be the same more or less, together with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

3d. A piece, parcel, or tract of land, with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging, situated

in the parish of New Orleans, on the right-hand side of the Gentilly road, on going towards Gentilly from the city of New Orleans, and
121 in the neighborhood of said Gentilly, and being about twenty-two arpents in front on said Gentilly road, and possessing depth and extending back from said road according to a plan of said piece, parcel, or tract of land deposited in the office of Savinier Blanc, notary public in and for the parish and city of New Orleans, by Richard Relf and Beverly Chew, by act dated the 27th day of December, 1820.

4th. A piece or parcel of land, with the buildings, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, situate in the city of New Orleans, and being known and distinguished as lots number one hundred and eighty-four and one hundred and eighty-six, in Royal Street, in said city, being the same lot of land and buildings which were sold and conveyed, together with other property, to said Daniel Clark by James Pitot, by an act of sale before Peter Pedesclaux, notary public, on the 24th day of February, 1813, measuring thirty feet in front on said Royal street, and one hundred and twenty feet in depth, and bounded on one side by property which in said month of February, 1813, was owned or possessed by Madame Widow Lanties, and on the other side by property which in said month of February was owned by Messrs. Grandchamp and Momier.

5th. Three lots of land adjoining together and forming but one piece or parcel of land, and each lot being sixty feet front, and one hundred and twenty feet deep, and situated on the southerly corner formed by the intersection of Toulouse and Burgundy streets, of the square of ground in the said city of New Orleans which is bounded and inclosed on one side by said Toulouse street, on the second side by Rampart street, on the third side by Saint Peter street, and on the fourth side by said Burgundy street, together with all the tenements, hereditaments thereunto belonging, or in anywise appertaining; the said three lots of land which form together, as aforesaid, but one piece or parcel of land, being the same that were sold and conveyed, together with other property, to said Daniel Clark by the aforesaid James Pitot, by act of sale passed before Pierre Pedesclaux, on 24th February, 1813, and are known and designated on a map or plan of the square formerly the old burying ground, and included aforesaid between Toulouse, Rampart, St. Peter, and Burgundy streets, drawn by Carlos Trudeau, dated June 11th, 1801, and deposited in the office of P. Pedesclaux, notary public, as lots Nos. 1, 2, and 12, said No. 1 forming the said corner of Toulouse and Burgundy streets, and measuring sixty feet four inches in front on Burgundy street and 120 feet deep.

6th. A piece, parcel, or tract of land situated in the quarter of the Bayou St. John, in said parish of New Orleans, containing about one hundred and thirty-five arpents, and adjoining the road of the canal Carondelet and the land of E. Conchieux, running thence along Broad street to Bellechasse street, of the faubourg St. John, and land which in the month of October, 1812, was owned or possessed by Mrs. Henry, thence to the land of Evariste Blanc and to the bayou St. John,
122 in conformity with a plan drawn by Joseph Pilie, dated August 20th, 1821, and annexed to an act of sale of said tract made by Richard Relf and Beverly Chew to Evariste Blanc, and passed before Philip Pedesclaux on the 30th day of October, 1821, together with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

7th. A lot of land with the buildings, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, situated

in the suburb St. John, at about half a league from the city of New Orleans, being known and distinguished on a plan of the said suburb made by B. Lafon, dated the 1st day of June, 1809, and deposited in the office of P. Pedesclaux, notary of the said city of New Orleans, as lot No. 3, in the square No. 23, of the said suburb St. John, being sixty feet in front on Washington street, and about one hundred and twenty feet deep.

8th. Eight lots of land from No. 1 to No. 8, both inclusive, forming the square No. 28 of the suburb St. John, in the said city and parish of New Orleans, as the same are laid down and described on the beforementioned plan of the said suburb St. John, made by B. Lafon, together with all the buildings, tenements, herditaments, and appurtenances thereunto belonging or in anywise appertaining.

9th. A lot of land situated in the said suburb St. John, in the square designated in the above-mentioned plan made by B. Lafon as the square No. 35, being 192 feet in front on Washington street, and sixty four feet deep, and forming a corner of said square of No. 35, together with all buildings, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

10th. A piece, parcel, tract, or square of land in the said suburb St. John, and known and distinguished on the said plan made by the said B. Lafon as the square number four in the said suburb St. John, and measuring two hundred feet front on said Washington street, three hundred feet front on St. John street, one hundred and thirty feet front on Broad street, and eighty feet front on place Le Breton, together with all the buildings, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

11th. A plantation or tract of land situated on the right-hand bank of the Bayou Lafourche, opposite the town of Donaldsonville, and measuring eleven arpents in front on the Mississippi River, and twenty nine arpents on the said Bayou Lafourche, be the same more or less, being the same tract or parcel of land which, during the lifetime of the said Daniel Clark, was purchased and held by Wade Hampton for the said Daniel Clark, and conveyed in February, 1818, by act passed before Charles D , judge of the parish of Ascension, by said Hampton, after the death of said Daniel Clark, to Richard Relf, one of the defendants hereinafter named, who assumed to receive such conveyance as pretended executor of said Daniel Clark, who subsequently conveyed the said tract or parcel of land to one Bartholemy Lafon.

12th. A tract of land purchased by Daniel Clark of William
123 Simpson, by act passed before P. Pedesclaux, notary public of the city of New Orleans, on the 5th day of June, 1812, and which is situated in the parish of Ascension and county of Acadia, on the left bank of the river Mississippi, measuring in front on said Mississippi River eighteen and one-half arpents, and extending back from said river Mississippi in depth forty arpents, and bounded on the lower side by land which was owned in 1816 by Beverly Chew and Richard Relf, and on the upper side by land which was sold and conveyed in said year 1816 by Beverly Chew and Richard Relf to Stephen Henderson and G. W. Destrehan.

13th. A lot, piece, or parcel of land in the city of New Orleans, in the square bounded by Delord street, Tivoli place, St. Charles street, St. Joseph street, and Camp street, being the lot on the southeasterly corner of said square, which corner is formed by the intersection of the said Camp street and Delord street, in the suburb St. Mary, of the city of New Orleans, and measuring sixty feet, French measure, on Camp

street, and one hundred and twenty feet, French measure, on Delord street.

14th. The equal undivided half part of a tract of land situated at Manchac, on the east bank of the river Mississippi, and bounded on the upper side by lands which, in the year 1815, were owned or poss'd by the Widow Harson, and on the lower side by lands reserved by the Spanish government for the fort, with all the depth that is expressed or conveyed, to the said Daniel Clark, in an act before Peter Pedesclaux, of New Orleans, notary public, dated June 23d, 1806, with all the rights, profits, commodities, servitudes, and appurtenances to the same belonging or in anywise appertaining, being the same that the said Daniel Clark sold and conveyed in his lifetime to Celestine St. M , by act passed before John Lynd, notary public, on March 6th, 1811, which act of sale was afterwards, to wit, on the 28th day of May, 1814, rescinded by sentence of the district court of the then third district of Louisiana.

15th. A piece, parcel, or tract of land situated near Duval's plain, about two leagues from the town of Baton Rouge, in Louisiana, containing five hundred arpents, be the same more or less, being the same tract which said Daniel Clark acquired by purchase of Charles Fessin, by an act passed before the parish judge of the parish of Baton Rouge, in the State of Louisiana.

16th. A tract of land containing fourteen thousand forty-seven arpents, be the same more or less, situate on the east side of the river Comite, nine miles from its confluence with the river Amite, and bounded, in the year 1819, on the north by lands belonging to the said Daniel Clark, on the south by lands granted to Sophia Josephia and Rosalia Grandpre, on the east by public land, and on the west by the river Comite, as appears by a certificate and map or plan of survey executed by Don Vincent Sebastian Pindado, and dated October 13th, 1803, and numbered 1,649.

17th. A tract of land containing twelve hundred and forty-eight arpents, situated in the district of East Baton Rouge, in the said eastern district
of Louisiana, six and one-quarter miles east of the river Mississippi,
124 and ten miles north quarter northeast of the fort of Baton Rouge,
and bounded, in 1819, north and east by public land, and on the south by land granted to John F. , and on the west by lands of the late John Britillier and late John Rosset, as appears by a certificate and plan of survey executed by said V. S. Pindado, dated October 9th, 1803, and numbered 1,644.

18th. A tract of land containing four thousand three hundred and sixty-four arpents, situated in the district of Baton Rouge, in the said eastern district of Louisiana, on the west side of Sandy Creek, nineteen miles south of the line of demarcation, and bounded, in 1819, on the north and west by public lands, on the south by lands granted to Carlos, and on the east by said creek, as appears by a plan and certificate executed by V. S. Pindado, dated December 23d, 1803, number' 1,693.

19th. A tract of land, three thousand eight hundred and twenty arpents, situated in the said eastern district of Louisiana, on the west side of the river Comite, and fronting thereon, three and one third miles above Redwood Creek, and bounded, in 1819, on the north by vacant lands, on the south by lands granted to J. B. Labitut, on the east by the said river Comite, and on the west by land belonging to the estate of the said Daniel Clark, as appears by a plan and certificate of survey, number' 1,699.

20th. A tract of land containing two thousand five hundred arpents, situated in the said eastern district of Louisiana, at the head of Jones's Creek, six and one-quarter miles quarter northeast from the fort of Ba-

ton Rouge, and bounded, in 1819, on the north and east by vacant lands, and on the south by lands belonging to the said Daniel Clark, as appears by certificate 1,700.

21st. A tract of land containing two thousand arpents, situated in the said eastern district of Louisiana, nine and one-quarter miles east quarter northeast from the fort of Baton Rouge, and bounded, in 1819, on the north by land of the said Daniel Clark, and on the south, east, and west, by vacant lands, as appears by a plan or map, and certificate of survey No. 1,700.

22d. A tract of land containing twenty-one thousand nine hundred twenty-one arpents, being an undivided part of three tracts containing fifty-two thousand arpents, situated on the east side of the river Amite, in the said eastern district of Louisiana, the lower line being about eight miles above its confluence with the river Comite, and bounded, in 1819, on the north by land granted to Jerome Lachapelli, on the south by land granted to G. M. Morgan, on the east by vacant lands, and on the west by the river Amite, as appears by the plan, or map and certificate of survey of Chs. Trudeau, number' 1,721, and dated April 17th, 1804.

23d. The equal undivided half part of a tract of land or plantation, situated in the parish of St. John the Baptiste, at about twelve leagues from the city of New Orleans, having about ten arpents in front on the river Mississippi, and forty in depth, and bounded, in 1814, on one side by lands owned or possessed by Cambre, and on the other by lands owned or possessed by the widow of James Deslondes.

125 25th. A tract of land situated on the left bank of the Bayou Lafourche, in the said eastern district of Louisiana, being about six arpents in front on the said bayou, and bounded, in 1819, on both sides by lands owned or possessed by Louis Haitier.

26th. A tract of land containing five thousand four hundred and seventy arpents, situate in the said eastern district of Louisiana, on the eastern side of the river Comite, at or about twelve and three-quarter miles from the line that separated the King of Spain's dominions from the American territory, and bounded, in 1813, by the lands surveyed for Don Manuel Parcia and Juan De Lassize, on the south by lands surveyed for Don Christoval De Armas, east by the said river Comite, and on the west by vacant lands.

Slaves.—Two hundred and twenty-six slaves, severally named Lubin, Coke, Solomon, Jacob, John, Jaques, Argen, Jacob, Antoine, David, George, Paul, Adam, Doctor David, Randolph, Etienne, Lubin, Ref, Providence, Lindor, Figuro, Nacisse, Nede, Isaac, Jean, Salmon, Austin, Jones, Gibaud, Wallace, Charles, Jaques, Cordis, Davis, Cardinal, Jerome, L'Ebene John, Merode, Willis, Moise Davy, Andrew, Driss, Andrew, Thom. Field, Bob, Alice, James, Harry, Storder, Arthur, Ledger, Sam, Phœbe, Fanny, Anne, Genevive, Betty, Polly, with her two children, one named John, and the other suckling; Liza with her child; William, a doctor negro; Hector, William, Janvier Stewart, Jim, Kersay, Maniver, Kett, Broun, John, Winy, with her child David; Old Esther, Billy, Hannah, James McCall, Phille, Betsy, with her child Monthson; Easther Morning, Sam, Old Lett, Grace, Elijah, James, Rose, Hannah Bird, Patty, Lawrence, Franky, John, Charles, McKensy, Margaret, Fanny, with her child Marie, Nelson, Major, Nanny, with three children, Hellick, Banky, and Marojah; Spendur, Thenier, Old Major, Darkey, Dorianna, Smith, Cambridge, Rachael, with her child Gabriella; L. Winney, Sarah, Judice, Polly, Fanny, Mace, Molly, Nancy, Kevy, Jane, Nancy, Washington, Betty, with her child Thom.; Betty, George, Old Rachael, Dinah Dam, Levy, Antony, Rachael,

Charlotte, Waldren, Patience, Suky, Lidley, Mamy, Edmund, Nailey, Betty, Ben, Jenny, Kitley, Henrietta, Bob, Elsy, Betty, Peggy, Hartas, Thomas, Sally, Ketti, Amy, William, Ben, Anny, Rashly, Jinny, Jones, Rachal, Jack, Mary, Joe, Sukey, Victoire, Joe, Rachal, Peggy, James, Harris, Rachal, George, James, Campaigne, Rose, Anne, Thom, Zazo, Peter, Mary, Duke, Chloe, James, Mary, Kelly, Darkey, Daniel, Louis, Sally, Luke, George, Job, Peggy, Jack, Nathan, Toby, Geoffy, Phil, David, James, Sheckling, Lucy, Morrow, George, Rose, Rosetta, Hannah, Judick, Kelly, Silva, Kitty, Julia, with her three children, named John, Quack, and Jenny Louisa; Little Jim, Jeny, Jobby, Jeffry, Nancy, Dinah, with her child James; Charlotte, Peggy, with her child Jeny, Arthur, Sally, Rady, Rachel, Rachal, as the said two hundred and twenty-six slaves are enumerated and described in a document purporting to be an inventory of the property of the said Daniel Clark's succession, deposited in the probate court in and for the parish and city of New Orleans.

126 *Stock, &c.*—Cows, oxen, mules, and other animals, furniture, and other articles of domestic use, books, shrubs and flowers, used and possessed during his lifetime by the said Daniel Clarke, at or immediately in the vicinity of his dwelling or domicil, in the suburb St. John, of the city of New Orleans, and which were of the value of four thousand and forty-four dollars and upwards, and also certain other furniture, articles of domestic uses, gardening tools, implements of husbandry, horses, oxen, mules, and other animals, of the value of three thousand eight hundred and seventy-three dollars and upwards, which were owned and employed by the said Daniel Clark during his lifetime upon the said plantation hereinbefore described, as purchased by him from Stephen Henderson.

Debts and choses in action.—1st. A debt of sixteen thousand dollars due to the said Daniel Clark by Zenon Cavalier and Louis De Feriet, and secured by mortgage, being the purchase money of a plantation situate on road of the Meterie, at the distance of one league and a half from New Orleans, sold to said Cavalier and De Feriet by said Daniel Clark, by act before Peter Pedesclaux, dated January 20th, 1812.

2d. A debt of fifteen hundred dollars and upwards, due from David Porter to the said Daniel Clark.

3d. A debt of ten thousand dollars and upwards, secured by mortgage, and due to the said Daniel Clark from David Urquhart, David Williams, and James Williams, for a tract of land sold to them by the said Daniel Clark, by act passed before Peter Pedesclaux, on the 16th day of March, 1812.

4th. Certain debts, amounting in all to the sum of eighty-five thousand four hundred and thirty-eight dollars and forty-one cents, as the same are specified in the document hereinbefore referred to as purporting to be an inventory of the estate of the said Daniel Clark.

A tract, piece, or parcel of land containing eight hundred square arpents, situated ten leagues south of Fort Dainmure, and two leagues east of Mississippi River, bounded N. by David Ross, E. by George Brandon, on the other side by crown lands; said land was acquired by Archinaud by concession and decree from the intendant and governor of the province, of the date of April, 1794.

A tract or parcel of land containing eleven hundred and fifty-three arpents square, in the district of Natchez, at a place called "Homochitto," bounded on one side by lands of Don Carlos De Grandpre, and on the other by lands of the Spanish domain, bo't of Josepe Maria

Captillo and Rosalia Grandpre, by act in the office of L. T. Caire, 25 June, 1797.

A lot or parcel of land thirty-one feet on Chartres street, in the city of New Orleans, running back seventy-four and one-half feet, then twenty five feet wide, running back one hundred and thirty five feet.

A tract, piece, or parcel of land situated in the district of Feliciana, between Feliciana river and the "Arroyo" Alexander, at about ten miles from Mississippi River, bounded on the south by land belong-
127 ing to Hugh Coile, E. by land of Mrs. Anne Marbury and Anna Higgins; on the north by lands of Bernard Barnaby McDermott, and on the west by vacant lands, and containing one thousand arpents, granted to Degoutin by Manuel de Lemos Gayoso, 27 Sept., 1798.

A lot or parcel of land thirty feet front on Conti street, in the city of New Orleans, ninety-six feet deep, bounded by Joseph Pomas and Sophia Bromer.

A lot or parcel of land in the city of New Orleans, forty-three feet front on St. Ann street, one hundred and fifty feet deep, bounded by John Frederick and Margaret Trudeau.

A lot or parcel of land in the city of New Orleans, thirty feet front on St. Louis street, one hundred and fifty feet deep, bounded by J. Ventura Morales and Francis Branton, f. m. c.

A tract, piece, or parcel of land containing one thousand arpents, in Natchez district, western part of the Bayou Feliciana, bounded by Robert Mossou, south by John Joyce, and for the other side vacant land.

Some tracts, pieces, or parcels of lands containing seven hundred arpents surface, on the waters of Bayou Sarah, bounded by "Sligo lands."

A lot or parcel of land in the city of New Orleans, seventy feet fronting Fort St. Louis, one hundred and twenty feet deep, bounded by Francisco Collet and Robert Jones.

A tract, piece. or parcel of land, eleven arpents four toises and one foot, fronting the river in parish La Fouche, bounded by Vizier and Judice, and on rear by a sort of lagoon or marsh.

A tract, piece, or parcel of land, containing three thousand arpents, in Baton Rouge district, east side Amite River, eight miles, more or less, above its confluence with the Comite River, bounded north by the lands of John Castilla, south by Robert Rovenfer, east by vacant lands, and west by said Amite River.—Survey No. 1641.

A tract, piece. or parcel of land, containing nine thousand arpents, on said Amite River, twelve miles, more or less, from its confluence with the Comite River, bounded N. and E. by vacant lands, S. by David Holston, and W. by said Amite River.—Survey No. 1642.

A tract, piece, or parcel of land, containing three thousand nine hundred arpents, in Baton Rouge district, on the right bank of Comite River, five miles, or near its confluence with Amite River, and eight miles N. E. ¼ E. of the fort, bounded N. by said Comite River, and by those of Austral and vacant lands, E. by Widow Le Loy, west by George Keor. —Survey No. 1645.

A tract, piece, or parcel of land, containing six hundred and two arpents, in the district of Feliciana, E. side river of that name, thirteen miles N. N. E. from confluence with the Mississippi River, bounded above by Isaac Leonard, Eben Adam, and Policarp Regillo, below by Gabriel Blackburn, and in front by said river Feliciana.—Survey No. 1676.

128 A tract, piece, or parcel of land, containing ten thousand two

hundred and sixty-three arpents, in the district of Baton Rouge, on the west side of Comite River, bounded N. by the stream Bosquet Rouge and vacant lands, and E. by the bank of the same river.—Survey No. 1647.

A tract, piece, or parcel of land, containing seven thousand arpents, in Baton Rouge district, east side of Comite River at sixteen miles, or near its confluence with Amite, bounded N. and E. by vacant land, S. by Thos. Urquhart, and W. by Comite River.—Survey No. 1648.

A tract, piece, or parcel of land, containing twenty-eight thousand five hundred and twenty arpents, in the district of Baton Rouge, according to a plan made by Trudeau.

A tract, piece, or parcel of land, forty arpents front and forty arpents deep, at Pass Opelousas, on or near Prairie Nes Pique, on both sides the bayou, acquired by Margaret des Bord from Joseph Labaume, per act before Alex. Cheralin Declanet, 18th Feb., 1782.

A tract, piece, or parcel of land, containing one thousand arpents, district of Feliciana, at about 15 miles distant, to the N. ¼ N. E. of Mississippi River, and about five miles to the E. of Feliciana River.

One-half of an establishment at St. Bernard, distant nine leagues from the city, with half the stock thereon, boundaries according to act before Charles Himines, 26th October, 1801.

A tract, piece, or parcel of land, containing ninety arpents, district of Galveston, bounded on one side by William Spawn, on the other by Francis Morales.

A lot or parcel of land, in the city of Galveston, on Mangana street, bounded by Jos. Capitaine and P. Ramares.

A tract, piece, or parcel of land, containing ten arpents front by forty arpents deep on each side the Bayou Terre aux Bœuf, making eight hundred superficial arpents, bounded on one side by Neurisse, and on the other by Clark and Delacroix.

A tract, piece, or parcel of land, containing eighty arpents, on Mississippi River at Galveston, with depth to Amite River, bounded on one side by Jos. Capitaine, and on the other by Jos. Pino.

Two lots or parcels of land, in the city of Galveston, being number one in square twenty-nine, and number two in square thirty, fronting streets Galvez, Collila.

A tract, piece, or parcel of land, forty arpents front on each side the river Nes Pique at the post of Opelousas, in all eighty arpents front, customary depth, beginning at the lane of the old road.

A lot or parcel of land, in the city of New Orleans, one hundred and twenty feet front on the road outside St. Louis door, and the depth as far as the limits of the land belonging then to Bpte. Marigny.

A lot or parcel of land, situated behind a tract of land the property of the purchaser, extending from the limits of said lot of ground to said Thomas street.

129 A tract, piece, or parcel of land, containing eleven and one-quarter arpents front on the river, with usual depth, in the parish of Ascension, bounded on the upper side by Mr. Rhodes, and on the lower by Mr. Bobes.

A tract, piece, or parcel of land, in the district of New Ibera (Newtow), Attakapas, containing twenty arpents front by forty deep, western side of the river Teche, and six other arpents on the eastern side thereof, according to plan of Portier, surveyor, &c., of 23d May, 1805.

A tract, piece, or parcel of land, "Aux Plaquemines Brusslees," county of Opelousas, having forty arpents front by forty arpents deep, joining on one side Henry Bossier, and on the other Maloo, containing twelve

hundred and ninety-nine $\frac{79}{100}$ acres, as per plan drawn by M. Darby, deputy surveyor, on the 1st of October, 1806.

A tract or portion of land, "Une Cypriere," from eight to ten leagues superficies, more or less, about five leagues by water below the "Poste du Ouachita," one league by land on the right bank of said river, on the Bayou de la Cheniere au toudre, according to the plan by Chas. Laveau Trudeau, late surveyor-general of Louisiana, and the concession of Don Manuel de Gayoso de Memos, governor of Louisiana, to Jean Filhiol, dated 18th September, 1797.

A tract, piece, or parcel of land, containing ten arpents front by forty deep, on the Ouachita River, granted to the said Filhiol by Dn. Juan Ventura Morales 3d April, 1802.

A tract, piece, or parcel of land, containing four hundred and eighty arpents, joining and in the rear of the land on the Bayou de la Chienere au toudre; also granted by Gov'r Memos to Filhiol on the 18th Sept., 1797.

A tract, piece, or parcel of land, containing thirty superficial leagues, or two hundred and eight thousand three hundred and forty-four arpents, granted to Joseph de la Maison Rouge by Baron de Carondelet, governor of the province, 20 June, 1797, according to a plan by Charles Trudeau, 14 June, 1797.

A tract, piece, or parcel of land, containing two hundred and twenty arpents or thereabouts, on the canal Carondelet, bounded by Le Breton Dorgenoy on the E., by suburb St. John on the north, by the bayou St. John on the W., and by said canal on the S.

Def'ts' ev. before Lusher, com'r. Demur'er of Relf and Chew, filed 2d April, 1849, in case of Gaines and Wife vs. Relf and Chew, No. 1765.

Circuit court of the United States in and for the fifth judicial circuit, holding sessions in the city of New Orleans, within said circuit, in chancery.

130 *Mad. Despau's testimony*, 1845.—*Filed Oct'r* 16, '45.

The State of Mississippi to all who shall see these presents, greeting:

Whereas it appears by the returns received at the office of the secretary of state, that J. A. Talbot is duly and constitutionally elected to the office of justice of the peace, in the first police beat, in and for Harrison County, in the State of Mississippi:

Now, know ye, that in consequence thereof, and by virtue of the constitution and laws of this State, we do authorize and empower him, the said J. A. Talbot, to execute and fulfil the duties of that office according to law; and to have and to hold said office, with all the powers, privileges, and emoluments to the same of right appertaining, from the day of the date hereof, for the term prescribed by law.

In testimony whereof I, Albert G. Brown, governor of the State aforesaid, have caused these letters to be made patent, and the great seal of the State to be hereunto affixed.

Given under my hand, at the city of Jackson, the 28th day of July, in the year of our Lord one thousand eight hundred and forty-five, and of the sovereignty of the State of Mississippi the twenty-eighth.

[L. S.] A. G. BROWN.

By the Governor:
WM. HEMMINGWAY,
Secretary of State.

EDMUND P. GAINES, AND HIS WIFE, MYRA Clark Gaines, *vs.* RICHARD RELF & BEVERLY CHEW, SARAH Campbell, and others.	United.

In pursuance of the annexed commission from the United States circuit court, I, the undersigned justice of the peace in Harrison County, in the State of Mississippi, have caused to come before me, in the village of Biloxi, this 16th day of October, 1845, Madame Sophia Despau, who, being duly sworn to declare the truth, the whole truth, and nothing but the truth, touching each and every of the said interrogatories annexed to the said commission, she answers as follows:

Answer to the first interrogatory. I was well acquainted with the late Daniel Clark, of New Orleans.

To the second (2d). Daniel Clark was married in Philadelphia, 1803, by a Catholic priest. I was present at this marriage. One child was born of that marriage, to wit, Myra Clark, who married William Wallace Whitney, son of General T. Whitney, of the State of New York; since then, to Gen. E. P. Gaines. I was present at her birth and
131 knew that Mr. Clark claimed and acknowledged her to be his child. She was born in 1806. I neither knew, nor any reason to believe, any other child besides Myra was born of that marriage. The circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Mr. DeGrange, she heard that he had a living wife. Our family charged him with the crime of bigamy, in marrying the same Zulime. He at first denied it, but afterwards admitted it, and fled from the country. The circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential, first, to obtain record proof of DeGrange having a living wife at the time he married my sister; to obtain which from the records of the Catholic church, in New York (where Mr. DeGrange's prior marriage was celebrated), we sailed for that city. On our arrival there we found that the registry of marriages had been destroyed. Mr. Clark arrived after us. We heard that a Mr. Gardette, then living in Philadelphia, was one of the witnesses of Mr. DeGrange's prior marriage. We proceeded to that city and found Mr. Gardette; he answered that he was present at said prior marriage of DeGrange; and that he afterwards knew DeGrange and his wife by this marriage; that this wife had sailed for France. Mr. Clark then said, you have no reason longer to refuse being married to me; it will, however, be necessary to keep our marriage secret, till I have obtained judicial proof of the nullity of your and DeGrange's marriage. They, the said Clark and the said Zulime, were then married. Soon afterwards, our sister, Mme. Caillavet, wrote to us from New Orleans that DeGrange's wife, whom he had married prior to marrying the said Zulime, had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy. Mr. DeGrange was condemned for bigamy in marrying the said Zulime, and was cast into prison, from which he secretly escaped by connivance, and was taken down the Mississippi River, by Mr. Le Briten D'Orgenois, where he got to a vessel, escaped from the country, and, according to the best of my knowledge and belief, never afterwards returned to Louisiana. This happened in 1803—not a great while before the close of the Spanish Government in Louisiana. Mr. Clark told us that before he could promulgate his marriage with my sister, it would be necessary that there should be brought by

her an action against the name of DeGrange. The anticipated change of government created delay; but at length, in 1806, Messrs. James Brown and Eligeas Fromentin, as the counsel of my sister, brought suit against the name of Jerome DeGrange, in the city court, I think, of New Orleans. The grounds of said suit were that DeGrange had imposed himself, in marriage, upon her at a time when he had
132 a living and lawful wife. Judgment in said suit was rendered against said DeGrange. Mr. Clark still continued to defer promulgating his marriage with my sister, which very much fretted and irritated her feelings. Mr. Clark became a member of the United States Congress in 1806. While he was in Congress, my sister heard that he was courting Miss Caton, of Baltimore. She was distressed, though she could not believe the report—knowing herself to be his wife; still his strange conduct, in deferring to promulgate his marriage with her, had alarmed her. She and I sailed for Philadelphia, to get the proof of his marriage with my sister. We could find no record, and was told that the priest who married her and Mr. Clark was gone to Ireland. My sister then sent for Mr. Daniel W. Coxe; mentioned to him the rumor. He answered, that he knew it to be true that he (Clark) was engaged to her; my sister replied, it could not be so. He then told her that she would not be able to establish her marriage with Mr. Clark, if he was disposed to contest it. He advised her to take counsel, and said he would send one. A Mr. Smythe came and told my sister that she could not legally establish her marriage with Mr. Clark, and pretended to read a letter, in English (a language then unknown to my sister) from Mr. Clark, stating that he was about to marry Miss Caton. In consequence of this information, my sister, Zulime, came to the resolution of having no further communication or intercourse with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia—Mr. Coxe advising her to do so.

To the third (3d). I became acquainted with Mr. Jerome DeGrange in 1793; when, as I understood, he first came to New Orleans. He was a nobleman, by birth, and passed for a single or unmarried man; and courted and married Zulime, née de Carrière, at the age of thirteen, the same who is the mother of Myra Clark Whitney. Zulime had two children by him—a boy and a girl; the boy died; the girl is still living; her name is Caroline; she is married to a physician, by the name of Barnes; I was present at the birth of these children.

To the 4th. Col. Bellechasse, who was well known throughout the island of Cuba as one of the most honorable of men, once the intimate friend of Mr. Clark, and, as he informed me, one of the executors of Daniel Clark's last will of 1813. The plantation of my son-in-law, Chevalier de Moréjon, was near that of Col. Bellechasse. I made my home with my son-in-law. Col. Bellechasse stated to Chevalier de Moréjon, in 1827, that if Richard Relf had not destroyed Daniel Clark's last will, that his (Clark's) daughter would have been the richest lady in this country—these remarks were made in my presence—and that, in this will of 1813, Daniel Clark had acknowledged her to be his legitimate daughter; and that this will was written in Daniel Clark's hand-
133 writing. Bellechasse further stated, he had several times written to the daughter of Daniel Clark, who was at that time in Philadelphia, but never received a reply, which he greatly regretted.

Answer to the 1st cross interrogatory. I have already stated that I was present at the marriage of Mr. Clark with Zulime de Carrière; they were married in the city Philadelphia; they were married in a house which had been rented for us. I do not remember the name of the

street. They were married by a Catholic priest, whose name I cannot now remember. The parties did not, to my knowledge, receive any certificate of their marriage; nor was there any publication of their marriage made in the newspapers, to my knowledge. I have already stated that I was present at her marriage (a private one). Besides myself, Mr. Dorsier, wealthy planter of New Orleans, and an Irish gentleman, friend of Mr. Clark's, from New York, were present at his marriage. The first time I saw Mr. Clark was in the latter part, I think, of 1802. I was shortly after introduced to him by Col. Bellechasse. My acquaintance with Mr. Clark ended in 1807. Mr. Clark left Philadelphia, shortly after his marriage, on account of important business. Mrs. Clark remained in Philadelphia until her departure for New Orleans. Previous to my sister's marriage, we remained a short time with a lady in Philadelphia—a friend of Mr. Clark and Mr. Coxe; I do not remember the name of the street. Mr. Clark called frequently to see us. The lady's name was Zulime de Carrière. I have already stated the history of this lady, in answer to the first interrogatory. She had two children by her marriage with Mr. DeGrange. She was married to Mr. Clark, as Miss Zulime de Carrière. I do not remember the exact month. Mr. Clark left, as I have before stated, on important business. I do not remember the exact time. His wife did not accompany him. I am not aware of his leaving Philadelphia with any gentleman. We returned to New Orleans, in about two months after Mr. Clark left Philadelphia. I saw Mr. Clark, frequently, in New Orleans, after his marriage with my sister. He informed me that he had communicated his marriage with my sister to Col. S. B. Davis, Mr. Daniel Coxe, and Mr. Richard Relf, and that the time was not distant when he would publicly acknowledge it. He kept a very handsome establishment for her, in New Orleans, and was in a constant habit of visiting her. I do not remember the name of the street. She resided with her sisters, from the time she was separated from Mr. de Grange, until she left for the North. I am her sister. I was not in New Orleans when Mr. Clark died. My sister was in Philadelphia; I have already stated that she was married at that time to Mr. Gardette. The history of that marriage has been given in my answer to the second interrogatory. She had three children by Mr. Gar-
134 dette. Mr. Gardette died in Bordeaux, (France), in 1831. It was the misfortune of my sister, only a girl of thirteen, to be deceived in her first marriage with Mr. DeGrange, who, as I before stated, was a married man at the time he married my sister. Being satisfied that she had been imposed upon by Mr. DeGrange, and was no longer his wife, she married Mr. Clark. Had it not been for the interested wickedness of Mr. Coxe, in assuring her, and employing counsel to aid him in misrepresenting to her that her marriage with Mr. Clark was illegal, she never would have married Mr. Gardette.

To 2d cross interrogatory. I first became acquainted with Mr. DeGrange 1793. He was a nobleman by birth; he owned in New Orleans a large distillery. I do not remember the street in which he resided. He married my sister in New Orleans in a Catholic Church. I do not remember now the name of the priest. Her maiden name was Zulime de Carrière. I have already stated that I know my sister is the mother of Myra Clark Gaines. The last time I saw Mr. DeGrange was in 1803. After he left New Orleans, he married, as I was informed, a widow lady residing in Vermont. I have also been told that he died some years ago. I do not remember the name of the place he died in. I was not present at Mr. DeGrange's first marriage. He was married in New

York. I do not remember the name of the lady whom he married. I never saw her.

To the 3d cross-interrogatory. The mother of Mrs. Gaines married Mr. Gardette in Philadelphia, in 1808. I was not present at that marriage. She lived with him twenty-three years. She was always recognized by their friends and acquaintances as his lawful wife. She had three children by this marriage; they were always regarded by their friends and acquaintances as legitimate. It was the misfortune of my sister to have been deceived by those whose duty it was to protect her, and it is my firm belief that neither in the eye of God or highly honorable men or women will she be condemned; but, on the contrary, be pitied for her unprecedented afflictions.

To the 4th cross-interrogatory. I am the aunt of Mrs. Gaines. I have already stated that my sister is the mother of Myra Clark Gaines, and the only issue of her marriage with Daniel Clark; consequently I knew she was his heir; and, therefore, did not require any information upon a subject so well known to me. I never received any letters on this subject from the parties in question. I am at present residing *at present* with my nephew and family at Biloxi, Mississippi. I have never received any promises or intimations of a pecuniary character from General or Mrs. Gaines. My only wish is that justice, which has been so long delayed, shall be finally done her.

(Signed) SOPHIE DESPAU.

135 Which answers, being reduced to writing, have been signed and sworn to, in my presence, this the sixteenth day of October, anno Domini one thousand eight hundred and forty-five.

In testimony whereof, I have hereunto set my hand and common seal, (having no seal of office), the day and year first above written.

[L. S.] J. A. TALBOTT,

J. P. 1st Police District of Harrison Co., State of Miss.

Interlineations and erasures in the above testimony:

Page 1, line 21, "since then to Gen. E. P. Gaines."
" 3, " 11, "of."
" 4, " 29, "in 1827."
" 5, " 14, "I think."
" 5, " 14, "after."
" 5, " 30, "leaving."
" 7, " 24, "on this subject" were interlined.
" 2, part of line 28, the whole of line 29, and part of line 30 erased.
" 6, part of 3d, the whole of the 4th and part of 5th line from the bottom erased.

J. A. TALBOTT, *J. P.*

136 DEFENDANTS' EVIDENCE.

Will of Daniel Clark, dated May 20th, 1811, and the proof thereof.—Extract from "probate record."

Process verbal of opening and proof of the last will.

Will of Daniel Clark. Ne varietur.

JS. PITOT, *Judge.*

In the name of God, amen! I, Daniel Clark, of New Orleans, do make this my last will and testament.

Imprimis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate and appoint my friends Richard Relf and Beverly Chew my executors, with power to settle everything relative to my estate.

New Orleans, 20 May, 1811.

(Signed) DANIEL CLARK.

Ne varietur.

JS. PITOT, *Judge.*

Proof of will.

Know all men by these presents that on the seventeenth day of August, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-eighth of the independence of the United States of
137 America, personally appeared before me, James Pitot, judge of the court of probates, in and for the city and parish of New Orleans, Paul Lanusee and Louis Sere, both residents in the city of New Orleans, who being duly sworn agreeably to law, declare and say that a packet folded up as a letter sealed with a red wafer, which I presented to them, and bearing the following subscription:

"This is my olographic will, New Orleans, 20th May, 1810. Daniel Clark;" that the same is the proper handwriting of him, the said Daniel Clark.

(Signed) PAUL LANUSEE,
LOUIS SERE.

Sworn to and subscribed before me.

(Signed) JS. PITOT, *Judge.*

NEW ORLEANS, *August 17th*, 1813.

Whereupon I, the said judge, caused the said packet to be broken open, in which was found one writing page signed Daniel Clark, and after caused the said instrument to be read in presence of the above-named witnesses, who did further recognize the same to be totally written by the late Daniel Clark.

(Signed) PAUL LANUSEE.
LOUIS SERE.

I do hereby declare that the said instrument is duly proved according to the laws of this State, as being the last will and testament in
138 scriptis of the late Daniel Clark, and order the said last will to be deposited and recorded in the register office of this court, that copies thereof may be delivered to all persons it may concern.

(Signed) JS. PITOT, *Judge.*

Petition of R. Relf, ex'or to remove seals and make inventory, etc., and order thereon.—Extract from "probate record."

Petition of R. Relf, ex'r, to remove the seals, August 18th, 1813.

STATE OF LOUISIANA,
Parish of Orleans, ss:

To the honorable James Pitot, judge of the said parish:

The petition of Rich'd Relf, one of the testamentary executors of the

last will and testament of Daniel Clark, dec'd, being desirous to cause the execution of said will as soon as possible completed, prays the seals affixed may be removed, and that an inventory of the goods may be ordered to be made by your petitioner, and that appraisers may be appointed to appraise the same, &c., and your petitioner will ever pray, &c.

Aug't 18, 1813.

(Signed) F. L. TURNER,
Att'y for the Pet'r.

Order.

Let the seals be removed to-morrow at 10 o'clock, and let an
139 inventory and appraisement take place according to law, Mr. Morau Lisbit being appointed counsel for the absent heirs.

New Orleans, this 18th of August, 1813.

(Signed) JS. PITOT, *Judge.*

Extract from the inventory of D. Clark's succession, embracing "de l'habitation des Chapitoulas (or Cannes Brulées").—Extract from "probate record."

Inventaire de l'habitation des Chapitoulas.

Et aujourd'hui, vingt huitieme jour du mois de Septembre, de l'an de nôtre Seigneur mil huit cent treize, et le trente huitième de l'Indépendance des Etats d'Amerique, quatre heures du matin, nous Thomas Beale, register des testaments pour la ville et parvisse de la Nouvelle Orleans, nous sommes transportés sur une habitation de la propriété de feu Daniel Clark, size à six lieux de cette ville, par en haut et du mêmebord, a la Côte des Chapitoulas, à l'effet d'y proceder à la continuation de l'inventaire descriptif et estimatif des propriétés de laissées par det Sieur Daniel Clark, ou etant nous, avous trouvé le Sieur Richard Relf, exécuteur testamentaire Louis Moreau Lislet, avocat nommé par la cour pour representer
l'heritiere absente, et avous en leur presence pris le serment des
140 Sieur Baron Boisfontaine et Lille Sarpy, appreciateurs choises
par l'exécuteur testament aire, de bien et fidelement se comporter dans leurs fonctions et d'estimer sur leur ame et conscience tout ce qui leur serait presente comme provenant de la dite succession, après quoi nous avous en presence de tous procede comme suit:

Habitation.—Item l'habitation sur laquelle nous operons, ayant vingt quatre acres et derni de terre, face au fleuve sur sa profondeur jusqu'au lac, borné d'un coté par Mr. Cadet Fortier et de l'autre par William Kenner, sur laquelle il existe des batisses, provisions, et récoltes suivantes.

Batisses.—Une peaugerie, une petite maison de maitre, vingt quâtre cabanes, à negre, un pégeoncire, et une boutique de ferguon.

Provisions.—Environ un, millier de mais.

Récolte.—Et enfeù cinquante acres de terre plantes en cannes-a-sucre; laquelle habitation telle qu'elle est decrete avec ses batisses, re'colte et provisions a été estimee par les memes appreciateurs la somme de cinquante mille piastres, $50,000.

Et attendu qu'il ne nous a plus non ete presente comme apparte
141 nant al a dite succession, nous register sus dit et soussigné avous
arrete le present a six heures de relevee, et lecture faite d'icelui, nous avous trouve le montant des meubles, fournitures et animaux inventoriés dans les presentes vacations etre de la somme de trois mille

huit cent soixante et treize piastres, celui' des cent soixante cinq esclaves de tout sexe et de tout age, et de la somme de cinquante deux mille sept cent soixante dix piastres; et enfin celle de l'habitation telle qu'elle este decrete ci-dessus, etre de la somme de cinquante mille piastres, ce qui forme ensemble une somme de cent six mille six cent quarante trois piastres; lesquels meubles, fournitures, animaux, esclaves, et habitation nous avous laisses a la charge du dit Sieur Richard Relf, exécuteur testamentaire, qui le reconnait et a signe avec nous et les autres parties et temouis, les memes jour mois et an que dessus, et nous sommes retire.

(Signe) MOREAU LISLET,
Defenseur des Heritiers Absents.
LILLE SARPY.
RICHARD RELF.
THO'S BEALE, *R. Wills.*

Translation of foregoing extract from the inventory of the succ'n of D'l Clark.

142 And this day, the 28th of September, A. D., 1813, and the 38th of the Independence of the States of America, at 4 o'clock in the morning, I, Thomas Beale, register of wills in and for the city and parish of New Orleans, repaired to a plantation belonging to the estate of Daniel Clark, deceased, situated six leagues above this city, on the same bank, at the coast of the Chapitoulas, for the purpose of proceeding further with the inventory descriptive and estimative of the said plantation, appurtenances, &c., left by the said Daniel Clark, where being, I found Mr. Richard Relf, testamentary executor; Louis Moreau Lislet, attorney appointed by the court to represent the absent heiress, and in their presence administered the oath to Messrs. Baron Boisfontaine and Lille Sarpy, appraisers chosen by the test'y executor, to well and faithfully discharge their duties and to conscientiously appraise all that would be presented to them as belonging to said succession; after which, in the presence of all, I proceeded as follows:

Plantation.—The plantation upon which we operate, having 24 and a half arpents front on the river, and extending as far back as the lake, bounded on one side by Mr. Cadet Fortier, and on the other by William Kenner, upon which there exist the following buildings, provi-
143 sions, and crops:

Buildings.—One purgery, a small residenc , twenty-four negro cabins, a pigeon-house, and a blacksmith shop.

Provisions.—One thousand of corn.

Crops.—And, lastly, 50 acres planted in sugar canes; which said plantation, as described, with its buildings, crops, and provisions, was valued by the same appraisers at the sum of fifty thousand dollars ($50,000).

And whereas nothing else belonging to said succession was presented to me, I, the register aforesaid and undersigned, have closed these presents, at 6 o'clock p. m., and after due reading thereof, I have found the amount of appraisement of the furniture, provisions, and animals inventoried during the present vacations to be the sum of $3,873; that of the 165 slaves of both sexes and of all ages to be the sum of $52,770; and, lastly, that of the plantation, as above described, to be the sum of $50,000, making together the sum of $106,643; which said furniture, provisions, animals, slaves, and plantation I have left in charge of the

said Mr. Richard Relf, test'y executor, who acknowledges the
144 same, and has signed with me and the other parties and witnesses, the same day, month, and year as above, and have retired.

MOREAU LISLET,
Att'y for Absent Heirs.
LILLE SARPY.
RICHARD RELF.
THO'S BEALE, *R. Wills.*

Petition of Richard Relf for letters testamentary and order granting same.—Extract from probate court.

Petition of R. Relf for letters, August 27th, 1855.

To the honorable the judge of the court of probates in and for the parish of Orleans:

The petition of Richard Relf, of this city, merchant, respectfully showeth: That late Daniel Clark, of this city, deceased, by his olographic will, duly proved before your honorable court on the seventeenth instant, appointed your petitioner and Beverly Chew of this city, merchants, his testamentary executors, with power to settle everything relating to his estate; that in consequence of the absence of said Beverly Chew of this State, your petitioner remains for the present the testamentary executor of said deceased.

145 Wherefore he prays that it may please your honor to order that testamentary letters may be delivered to him according to law.

And, as in duty bound, your petitioner will ever pray.

(Signed) RICHARD RELF.

Order.

Let testamentary letters be delivered to the petitioner according to law.

New Orleans, August 27th, 1813.

(Signed) JS. PITOT, *Judge.*

Oath o JR. Relf, testamentary executor.—Extract from probate record.

Oath of test'y ex'r, R. Relf, August 27, 1813.

Before me, John Be M. Briere, deputy register of the court of probates for and in the parish of Orleans, personally appeared Richard Relf, esquire, who solemnly swears that he will well and faithfully perform all and singular the duties of a testamentary executor of the late Daniel Clark, deceased. So help him God.

(Signed) RICHARD RELF.

Sworn and subscribed before me, New Orleans, this twenty-seventh day of August, 1813.

(Signed) BRIERRE, *D'y R'r.*

146 *Letters testamentary to Richard Relf.—Extract from probate record.*

Letters testamentary to R. Relf, August 27, 1813.

The government of the State of Louisiana to all whom these presents shall come, greeting:

Whereas Richard Relf, of the parish of Orleans, named and appointed

executor of the last will and testament of Daniel Clark, late of the parish aforesaid, deceased, having duly proved the same and applied to the court of probates in and for the parish of Orleans, by petition, praying the court to grant letters testamentary thereon:

Now, know ye, that the said Richard Relf has been, and he is hereby, authorized and empowered to collect the goods and effects which were of the said estate of the late Daniel Clark, deceased, and to make a joint inventory thereof, and of all other acts to do and perform as executor testamentary of the said last will and testament.

Witness James Pitot, esquire, judge of the court of probates for the parish of Orleans, this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-eighth of the Independence of the United States.

(Signed) THOS. BEALE, [SEAL.]
Register of Wills for the Parish of Orleans.

147 *Account of administration by executors, so far as it relates to Cannes Brulées' estate.—Extract from probate record.*

Debt in relation to the Cannes Brulées' estate.

92. To Stephen Henderson, for D. Clark's notes given in payment of this estate...	$80,000 00	
Israel Trust, for am't of a mortgage-note held by him annexed by D. Clark.....	40,000 00	
Interest due thereon.....	1,000 00	
Ditto paid Stephen Henderson on deferred payments of sale to the Fortiers.....	5,911 00	
93. Advertising sale.....	232 00	
94. S. Henderson, for sugar furnished.....	53 00	
95. Taxes.....	338 24	
96. Pasturage of cattle during inundation....	140 00	
97. Bartlett & Coxe, for pork.....	36 00	
98. Duncan & McCall, for pork.....	168 00	
99. St. Armand, for plant cane.....	280 00	
100. Samuel Elkens, for corn.....	822 00	
101. Doctor Claveria, for attendance.....	100 00	
102. S. Hughes, for apprehending a runaway slave.....	35 50	
103. S. Dinmore, ditto.....	69 00	
104. Baron Boisfontaine, salary as overseer & expenses.....	1,146 00	
105. Charles Marty & Co., for supplies.....	685 05	
		131,015 79

Incidental charges.

Provisions for slaves	39 75	
Wines, drugs, and interments.....	19 75	
Notarial fees and recorder of mortgages..	19 37	
Taxes on house, suburb St. Mary.....	7 37	
F. L. Turner, professional services.....	120 00	
Edward Turner, professional services....	413 32	
		643 31
Sale at auction by register of will. Sale by ditto to M. & O. Fortier of the Cannes Brulees' estate and slaves.....	120,000 00	

Petition in re M. C. Gaines vs. H. H. Heron, No. 169 *of the docket of the Confederate States district court for the district of Louisiana, referred to in affidavit of Wm. Reed Mills, marked "Y" & statement of J. W. Gurley, marked W.—Filed April* 18*th*, 1878.

To the honorable the district court of the Confederate States for the district of Louisiana:

The petition of Myra Clark Gaines, an alien, citizen of the District of Columbia, now temporarily residing in Virginia, respectfully shews, that H. H. Heren, a citizen of the State of Louisiana, residing in said District, is now in possession of, and claims title to, all that piece, parcel, or tract of land, with the improvements thereon, a particular description of which is hereinafter given and made part hereof, it being the same land that was owned by the late Daniel Clark, and found in his succession at the time of his death, on the 16th of August, 1813. That prior to his decease, to wit, on the 13th day of July, 1813, the said Clark, did duly make, execute, and publish his last will and testament in writing, and thereupon, amongst other things, acknowledge your petitioner to be his legitimate and only child, and bequeath to her all the estate, real or personal, of which he might die possessed, including the property hereinafter described. That on the 11 of December, 1855,
149 the said will was admitted to probate, and its execution ordered by the supreme court of Louisiana, as appears by reference to the record and proceedings in the case of the succession of Daniel Clark, on application of Myra Clark Gaines, &c., No. 8646, in the second district court of New Orleans. That by virtue of the said will, and of her filiation to said Clark therein acknowledged, she became invested with the title to the said property upon his decease. That your petitioner was born in New Orleans, on the 31st of December, 1806, and before she was eight years of age was removed to the State of Pennsylvania, and has ever since resided out of the State of Louisiana. That in the year 1836, she instituted suit in the circuit court of the United States, 5th circuit and eastern district of Louisiana, against the vendors and authors of the defendant's title, to wit, the city of New Orleans, James Hopkins, F. Z. Martin, and others, then in possession of, and claiming title to, the said property, by which the defects of the said occupants' title were made known to them, and that said suit was not terminated until March, 1852, and then as in case of non-suit. That he and his said vendors and others, immediate and remote, are and were possessors in bad faith, on the grounds stated in said suit, and without any title whatever emanating from your petitioner; and defendant having
150 known the defects of his said title, is liable to her for fruits and revenues yielded by the said land, at the rate of 5,000 dollars per annum, ever since the 16th day of August, 1813. She avers further, that the answer of the defendant, under oath and according to law, to the following interrogatory on facts and articles is material to the plaintiff's case, to wit: Was or was not the said land in the succession of the said Daniel Clark immediately after his death? If yea, give an abstract of the title under which you claim, showing dates of all intermediate conveyances, and before whom the same were passed; and if you claim through Beverly Chew and Richard Relf, or either of them, assuming to represent the said succession, or any claimants thereto, annex a copy thereof to your answer. If you answer that you do not claim the particular property herein described, state whether you claim any portion

of the property described and claimed by plantiff in the suits above referred to, and what? Describe the same. She avers amicable demand and refusal to comply.

151 Wherefore, she prays that defendant may be cited to answer this petition and the said interrogatory, in the manner and within the time required by law; that after due proceedings it may be declared that petitioner is the owner of said property, and that defendant may be condemned to deliver up the same to her, and to pay for the fruits and revenues at the rate above set forth, with costs, and for general relief.

Description of the said property: A certain square or parcel of ground, situated in the Faubourg St. John, of this city, designated in square No. 16, according to a plan made by Lafon, dated 9th June, 1809, and deposited in the office of L. T. Caire, late a notary public of New Orleans, bounded by St. John, Route, Lepage, Sixth and Fifth streets; said square is a portion of property that was acquired by D'l Clark, from Nicholas Maria Vidal and others, at sundry times, by sundry acts before L. T. Caire and William Christy, notaries public, during the years 1804, 1805, 1807, and 1809.

(Signed) F. PERIN, *Atty. for Pl'ff.*

152 *Exception in re M. C. Gaines vs. H. H. Heron, No.* 169 *of the docket of the Confederate State' Court, district of La., referred to in affidavit of Wm. Reed Mills, marked Y.—Filed April* 18, 1878.

Confed. States dist. court.

MYRA CLARK GAINES *vs.* H. H. HERON. } No. 169.

Now into this hon. court, by counsel, comes H. H. Heron, the abovenamed defendant, a citizen of the State of Louisiana, and excepts to the petition of Myra Clark Gaines, and avers he is not bound in law to make any answer thereto, and for cause of exception he shows that, by the citation served upon him, plaintiff is admitted to be a citizen of the United States, and by the allegation of her petition she is a citizen of the District of Columbia, a territory both de jure and de facto a part of the United States, and subject to the government thereof, and all of whose citizens are citizens of the United States, and subject to the government thereof, and all of whose citizens are citizens of the United States; that by an act of the congress of the Confederate States, No. 106, a state of war was recognized as existing between the United
153 States and the Confederate States, and consequently the citizens of the United States, including the plaintiff, have no jus standi in judicio, and said plaintiff cannot be heard in this suit.

Wherefore he prays he may not be required to make further answer to the petition, and that the same may be dismissed at plaintiff's costs, and for all general relief.

2-5, '62. (Signed) BUDD & LAMBERT, *For Deft.*
DURANT & HORNER, *Att'ys for Deft.*

Bond for costs, marked K, referred to in affidavit of Wm. Reed Mills, marked Y.—Filed April 18, 1878.

Confederate States district court for the district of Louisiana.

MYRA CLARK GAINES *vs.* MINOR KENNER ET AL. } No. 46.

Philippe Baron Boisfontaine, being duly sworn, says that he is worth between two and three thousand dollars in real estate, situated in this city, above all his debts and obligations, and considers himself able to pay all the costs that the plaintiff may incur in her said suits.

New Orl's, Dec'ber 30th, 1861.

(Signed) PH'E BARON BOISFONTAINE.

154 Sworn to and subscribed before me, at New Orleans, 30th Dec'r, 1861.

(Signed) J. W. GURLEY, *Clk.*

NEW ORLEANS.

I hereby bind myself as security for the costs of all the suits which may be instituted by Mrs. Myra Clark Gaines, in the district court of the Confederate States for the district of Louisiana, holding sessions at New Orleans.

New Orl's, Dec'ber 30th, 1861.

(Signed) PH. BARON BOISFONTAINE.

Will and probate of the will of 1813.

Second district court of New Orleans.

STATE OF LOUISIANA:

Succession of Daniel Clark, on the application of Mrs. Myra Clark Gaines for the proof of the will of Daniel Clark, No. 8646.

Petition filed 18th January, 1855.

(Signed) OCTAVE MOREL, *Deputy Clerk.*

To the honorable the second district court of New Orleans:

The petition of Myra Clark Gaines, who resides in the city and State of New York, respectfully represents:

That on the sixteenth day of August, A. D. 1813, Daniel Clark,
155 then residing in New Orleans, departed this life, leaving no descendants except your petitioner, who is the daughter of said deceased.

That on the 13th day of July, 1813, the said Daniel Clark made his last will, which was in substance and to the effect following:

NEW ORLEANS, *July* 13, 1813.

In the name of God, amen. I, Daniel Clark, of New Orleans, do make this my last will and testament. Imprimis. I order that all my just debts be paid.

Second. I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named.

Third. It is my desire that my friend, Chevalier François Dusuau De la Croix shall have the charge of my said daughter Myra, and I do appoint and constitute him tutor to her.

Fourth. I give and bequeath unto my mother, Mary Clark, now or recently of Germantown, in the State of Pennsylvania, an annuity of two thousand dollars, which is to be paid out of my estate during
156 her life. I further give and bequeath an annuity of five hundred dollars to Caroline De Grange until she arrives at the age of majority, after which I give and bequeath her a legacy of five thousand dollars.

Fifth. I hereby nominate and appoint my friends, Francis Dusuau de la Croix, James Pitot, and Joseph D. D. Bellechasse, my executors, with full power to execute this my last will, and to settle everything relating to my estate.

Petitioner further avers that the said will contained other legacies and depositions; that said testator gave a legacy of $5,000 to a son of the said Pitot, and another of $5,000 to a son of Mr. De Buys, both of New Orleans. He also provided for the freedom and maintenance of his slave Lubin. In his said will the said Clark made an inventory of his estate, with explanations of his business relations, and gave instructions to the said tutor, de la Croix, in regard to the education of your petitioner. She further represents that the said will was an olographic one, wholly written, dated, and signed by the testator in his proper handwriting, and at the death of the said Clark was left among his papers at his residence.

That after his decease diligent search was made for said will, but
157 the same could not be found, nor has it been since, and it was either mislaid, lost, or destroyed; that the destruction of said will has prevented her from giving the contents thereof with any greater certainty than as set forth herein above.

Petitioner further shows that Messrs. Bellechasse and Pitot, two of the above-named executors, are dead; that the said de la Croix, the other, is indisposed to accept the executorship of the said will, and that no presumptive heir of said Clark resides in this State. She further shows that at the decease of said Clark, and for many years after, she was a minor, wholly ignorant of her rights under said will, and that after she arrived at the age of majority and was made acquainted with the matters aforesaid, she instituted a suit, on the 18th of June, 1834, in the probate court of New Orleans, for the purpose of proving the said will, but the said suit was dismissed, as in case of non-suit, on the 8th day of June, 1836, without any fault of your petitioner.

That in the year 1836 she instituted suit by bill in chancery in the circuit court of the United States for the eastern district of Louisiana, to set up the said will and enforce her right as universal legatee under the same, but that the Supreme Court of the United States
158 dismissed her claim under the said will, as in case of non-suit, without deciding on the merits of the cause, and without the fault of your petitioner.

Wherefore she prays that this honorable court would fix a day, place, and hour for the proof of the said will, and after all due proceedings

such as the law requires, that the same may be recorded and its execution ordered, and for general relief; and she will ever pray, &c.

(Signed) T. E. BONFORD,
(Signed) SMILEY & PERIN,
(Signed) MOISE & RANDOLPH.
Attorneys for Petitioner.

Order.

Let the will within referred to be proved before me on Saturday the 27th day of January, 1855, at 10 o'clock a. m.

(Signed) J. N. LEA, *Judge.*

Decree of the supreme court of the State of Louisiana.

MONDAY, *December 17th*, 1855.

It is therefore ordered, adjudged, and decreed by the court that the judgment of the lower court be avoided and reversed, and proceeding to render such judgment as *such* have been rendered in the lower court, it is ordered, adjudged, and decreed that the will of Daniel
159 Clark, dated "New Orleans, July thirteenth, eighteen hundred and thirteen," as set forth in the plaintiff's petition, be recognized as his last will and testament, and the same is ordered to be recorded and executed as such. And it is further ordered and decreed that Francois Dusuau de la Croix be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said de la Croix, and the cost of this proceeding be borne by the succession.

A true copy: Clerk's office, New Orleans, February 26th, 1856.

(Signed) EUGENE LASERE, *Clerk.*

Decree of the supreme court of the State of Louisiana.

MONDAY, *February 18th*, 1846.

It is therefore ordered, adjudged, and decreed that the judgment heretofore pronounced by us in this case be amended by adding to the same the words "reserving to said Richard Relf the right, if any he have, to oppose said will in any manner allowed by law, as fully as he could have done had he not been a party to these proceedings."

A true copy: New Orleans, February 23d, 1856.

(Signed) EUGENE LASÈRE, *Clerk.*

I, P. S. Wiltz, clerk of the second district court of New Or-
160 leans, and as such duly commissioned and sworn, do hereby certify that the foregoing six pages contain a true and correct copy of the last will and testament of Daniel Clark, deceased, and of the decrees of the supreme court of the State of Louisiana, as recorded in Will Book No. 10, pages 307, 308, 309, and 310.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, on this 13th day of December, A. D. 1856.

[SEAL.] (Signed P. S. WILTZ, *Clerk.*

Judgment in re Fuentes et als. vs. Myra C. Gaines. No. 8038 *on docket of circuit court of the U. S. in and for the district of Louisiana.—Signed April* 30*th*, 1877.—*April term*, 1877.

NEW ORLEANS, *Monday, April* 30*th*, 1877.

Court met pursuant to adjournment.—Present, Hon. E. C. Billings, district judge.

JOSEPH FUENTES ET AL.
vs.
MYRA CLARK GAINES. } No. 8038.

This cause came on to be heard on the petition, exceptions, answers and proofs in the cause and the agreement of 8th February, 1877,
161 on file, that it should be consolidated, tried, and decided with the suits numbered and entitled—

No. 4006, Myra Clark Gaines vs. Dennis Cronan et als.
" 3663, Myra Clark Gaines v. P. H. Monsseaux et al.
" 4031, Myra Clark Gaines vs. N. Longue et al.
" 5058, Myra Clark Gaines vs. L. F. Compton et al.
" 2734, Myra Clark Gaines vs. M. J. de Lizardi et al.
" 6085, Myra Clark Gaines vs. P. F. Aguelly et al.
" 4051, Myra Clark Gaines vs. Charles Lesseps et al.
" 5099, Myra Clark Gaines vs. A. Harman et al.

On consideration whereof it is ordered, adjudged and decreed, that the certain last will and testament of Daniel Clark, dated the 13th July, 1813, probated and ordered to be recorded and executed by the final judgment of the supreme court of Louisiana, of the 17th December, 1855, was duly probated, and upon sufficient legal and truthful testimony.

And the court doth further adjudge and decree that said probate was not a fraud upon the rights of the parties herein attacking the same.

And it is further adjudged and decreed that the said Daniel Clark did date, write, and sign his said last will and testament of the 13th July, 1813, and wholly in his own handwriting; that the said will contained the bequests and legacies; that it recognized the defend-
162 ant to be his legitimate and only daughter, and left and bequeathed unto her, the said Myra, all the estate, whether real or personal, of which he, the said Daniel Clark, might die possessed of, subject only to the payment of certain legacies therein named, and as adjudged by the said final judgment of the supreme court of Louisiana.

And it is further ordered, adjudged, and decreed that the petition and prayer of the said plaintiffs herein, for the revocation of the said will of July 13th, 1813, and recalling the said decree of probate thereof, be rejected.

And it is further ordered, adjudged, and decreed that the defendant, Myra Clark Gaines, have execution against the plaintiffs for her costs incurred in this cause.

April 30th, 1877.
(Signed) EDWARD C. BILLINGS, *Judge.*

Complainant offered: The filing of the mandate of the Supreme Court of the United States in the case of Gaines vs. Relf, Chew, et als., No. 122, filed in the circuit court 3 January, 1853, delivered at Decem-

ber term of the Supreme Court, in the words above quoted, and as found near the top of page 361 of The New Orleans printed record, Vol. 1.

163 *Entry at January rules*, 1849, *in suit No.* 122.—*January* 2, 1849.

GAINES AND WIFE,
vs.
RELF, CHEW, JNO. HOLLIDAY, AND OTHERS.

On filing amended bill and supplement and revivor in this suit, to revive the same against the heirs and legal representatives of Mariah Holliday, who have departed this life since the filing of the original bill in this cause, it is ordered, on motion of P. C. Wright, solicitor for complainants, that a subpœna issue to revive and answer, directed to the defendants, Daniel C. Holliday, William R. Taylor and Maria his wife, and Miner Kenner and Eliza his wife, to show cause why the said bill of complaint should not be revived against them as the legal representatives or heirs of John R. Holliday and Maria Holliday, deceased, two of the defendants in said original bill of complaint, and who have departed this life since the filing thereof, and that they and each of them show cause as aforesaid, or answer thereto, on or before the rule day in February next.

Entry at January rules, 1849, *January* 2, 1849.—*January rules*, 1849, 3*d January*, 1849.

GAINES AND WIFE
vs.
J. JAUDOT ET ALS. } No. 122.

164 On filing bill of revivor and supplement in this cause against Jean Jaudot, Benjamin Rodriguez, Josephine (widow of Chs. F. Leotaud), Joseph Leotaud, Joseph Vignaud, Chas. Narcine Vignaud, Mariah Magdalen Vignaud (wife of Joseph Carmell), Maria Sarah Carmel, H'y Lockett, Josiah Cole, Mariah Theresa Moyse, Falex (agent of the heirs of Ramon Mausana), Barthelemy Rey Martin, on motion of P. C. Wright, of counsel for complainants, it is ordered that subpœna be issued, directed to the said Jaudot and others above named, to show cause why the bill of complaint in this cause should not be revived against them, and stand in the same plights and condition as the same was when it became abated, as in said revivor and supplement set forth, on or before the rule day in March next.

Entry at rules of 19*th April*, 1841, *taking the bill in suit No.* 122 *pro confesso as to Jno. Holliday et als.*

And afterwards, to wit, on the 19th day of April, 1841, this order was entered upon the minutes of said court, which reads in the words and figures following, to wit:

Title No. 122.

On motion of R. H. Chinn, esq., solicitor of the complainants, and it appearing to the court that subpœnas have been duly served, and no answers filed by the following-named defendants: John Holliday,

165 Z. Fortier, Mrs. Holliday, Luke Vigneau, Antoine Piernas, James Hopkins, Rene Lemanier, P. A. Tarbe, F. D. De la Craix, Lallaude Ferriere, Louis Desdunes, fils, Ramon Mansana, and Claude Lamonier; ordered, that the bill be taken pro confesso as to the said defendants, and it is further ordered that an attachment issued against Calloway, a defendant who has been duly served and filed to answer.

Appearance for demurrer of Mrs. Maria Halliday et als. of 12th April, 1841.

For and on behalf of the widow Jobet, Luke Vigneau, Charles Fonde, Belfine Beadulo, Antoine Piernas, John Mathew, Ramon Mansana, and Manuel Marquez, join in the above demurrer for all the causes therein set forth. Isaac T. Preston, solicitor for them.

On behalf of I. H. Field, Lockett & Mixon, solicitors.

On behalf of Mrs. Maria Holliday and D. Dela Croix, Louis Janin, solicitor.

On behalf of the New Orleans and Carrollton Railroad Company, of George and Duncan Renne and John Minturn, Thomas Slidell, solicitor.

Filed April 12th, 1841.

DUNCAN N. HENNEN, *Clerk.*

166 *Entry at rules 17th May, 1845, taking bill pro confesso.*

Title No. 122.

It appearing to the court, on motion of complainant's solicitor, that the following named defendants have been regularly served with process, herein or heretofore, appeared in the case, and they having failed to answer complainants' bill, it is ordered that the same be taken as confessed against them, to wit, Sarah W. Alexander, Robert Avart, Josiah Baker, the New Orleans and Carrollton Railroad Company, James Galloway, E. Cusin, F. D. dela Croix, Jonis Desaunes, fils, B. Doyle, Sonat Dufasset, F. Duplantier, C. Edwards, Charles Jordi, Herbert Fortier, L. Fortier, Claude Gauchinette, Thomas D. Hailes, John Holliday, James Hopkins, Mariah Holliday, George Kenner, Duncan Kenner, François P. Labarre, the mayor, aldermen, and inhabitants of the city of New Orleans, Jane McRae, F. X. Martin, John Minturn, Ramon Mansana, Widow P. Michell, Theophile Minor, F. H. Petitpain, Claude Samory, C. Toledano, Luke Vigneaux, Mrs. West, Gabriel Winter.

Bill taken pro confesso as to Holliday et als.

And afterwards, to wit, on the 8th day of April, A. D. 1841,
167 this order was entered upon the minutes of said court, which reads in the following words and figures, to wit:

Title No. 122.

On motion of R. H. Chinn, esq., complainants' solicitor, and it appearing to the court that subpœnas have been duly served, and no answers filed, ordered that the bill be taken pro confesso against the following defendants, to wit: Mrs. Widow Jaubert, Widow P. Mitchell, John Holliday, Sarah M. Alexander, Belfine Berdule, Claude Gauchinette, Charles Patterson, F. H. Petitpain, B. Doyle, John Matthew, Norbert Fortier, Etienne Cousin, mayor, aldermen, and inhabitants of the city of New Orleans, Jane McRae, F. P. Labarre, and Charles Edwards.

And afterwards, at December rules, 1844, to wit, on the 2d day of the said month, the following entry was made in the same docket:

Title No. 122.

Bill taken for confessed as to defendants, except Chew, Relf, Dela Croix, and Holliday, and set for trial by complainants.

Mandate of the Supreme Court of the U. S. in re Myra C. Gaines vs. D. N. Hennen, as found in 24th Howard U. S. Reports, p. 617.

168 And the court doth now here remand this cause to the said circuit court, for such further proceedings as may be proper and necessary to carry into effect the following directions, that is to say:

1. To cause the said defendant, Hennen, forthwith to surrender all the property so claimed and held by him as aforesaid into the hands of the said Myra Clark Gaines as a part of the succession of the said Daniel Clark.

2. To cause an account to be taken by the proper officers of the court, and under the authority and direction of the court, of the yearly rents and profits accrued and accruing from the said property since the 13th of May, 1844, when it came into the possession of the defendant, Hennen, and to cause the same to be accounted and paid to the said Myra Clark Gaines, the account to be taken subject to the laws of Louisiana in cases of such recovery as is now decreed in favor of the said complainant.

3. To give such directions and make such orders from time to time as may be proper and necessary for carrying into effect the foregoing directions, and for enforcing the due observance of the same by all parties and by the officers of the court.

Mandate of the Supreme Court of the United States in the case of Myra Clark Gaines vs. City of New Orleans et al., as found in 6th Wallace U. S. Reports, p. 718.

The decree of the circuit court for the eastern district of Louisiana is reversed, and this cause is remanded to that court, with instructions to enter a decree for complainant in conformity with this opinion.

170 *Petition of F. De la Croix and affidavit attached.*

Petition of F. D. De la Croix.—Filed August 18, 1813.

To the honorable the judge of court of probates of the parish of New Orleans:

The petition of Francis Dusuau de la Croix, of this parish, planter, respectfully showeth that your petitioner has strong reasons to believe, and does verily believe, that the late Daniel Clark has made a testament or codicil posterior to that which has been opened before your honorable court, and in the dispositions whereof he thinks to be interested.

And whereas it is to be presumed that the double of this last will, whose existence was well known to several persons, might have been deposited with any notary public of this city, your petitioner therefore prays your honor to order, as is the usual practice in such case, that every notary public of this city appear before your honorable court within the delay of twenty-four hours, in order to certify on oath if there does

or does not exist in his office any testament or codicil, or any sealed packet deposited by the said late Daniel Clark.

And your petitioner, as in duty bound, will ever pray, &c.

(Signed) SEGHERS,
Of Counsel for the Pet'r.

Affidavit.

171 Francis Dusuau de la Croix, the above petitioner, maketh oath that the material facts in the above petition set forth are true to the best of his knowledge and belief.

(Signed) DUSUAU DE LA CROIX.

Sworn to before me August 18, 1813.

(Signed) THOS. BEALE,
R. Wills.

Testimony of P. Baron Boisfontaine, taken under commission in May, 1835.

Commission.—Issued 12th May, 1835.

THE STATE OF LOUISIANA:

Court of probate.

WM. W. WHITNEY AND MYRA C. WHITNEY
vs.
ELEANOR O'BEARN AND ALS. } 843.

To David B. Morgan, esquire, Madisonville, parish of St. Tammany, Louisiana, or to any justice or the peace in said parish, greeting:

Know ye that we, reposing confidence in your prudence and fidelity, do, by these presents, give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in our said court in which Wm. W. Whitney and Myra C. Whitney are plaintiffs and Eleanor O'Bearn and als. are defendants.

Therefore we desire you, that at certain times and places, by you to be appointed for the purpose, that you cause the said witnesses
172 to come before you; that you then and there examine them apart upon their respective corporal oaths first taken before you upon the Holy Evangelists; that you reduce their examinations to writing, and when you shall so have taken them, that you send the same, with this commission, closed up under your seal, to us, in our said court, in the City of New Orleans, without delay.

Witness the honorable Charles Maurian, judge of our said court this fourth day of May, in the year of our Lord one thousand eight hundred and thirty-five, and in the fifty-ninth year of the Independence of the United States.

(Signed) S. BLOSSMAN,
D'y R'r of Wills. [SEAL.]

Court of probate.

WILLIAM WALLACE WHITNEY AND MYRA, his wife,
vs.
E. O'BEARNE AND OTHERS.

Interrogatories to be propounded to witnesses on behalf of the plaintiffs in this cause.

1st. Were you acquainted with the late Daniel Clark, deceased, of New Orleans? If so, were you at any time on terms of intimacy with him?

2d. Did the said Daniel Clark at his death leave any child acknowledged by him as his own? If so, state the name of such child, whether said child is still living, and if living what name it
173 now bears; and also state when and where, and in what terms, said acknowledgment of said child was made.

3d. Have you any knowledge of a will said to have been executed by said Clark shortly before his death? Did you ever read or see the said will, or did Daniel Clark ever tell you he was making said will, or had made said will? If so, at what time and place? and if more than once state how often, and when and where.

4th. If you answer the last question affirmatively, state whether the said Daniel Clark ever declared to you, or to any one in your presence, the contents of said will, and if so, state the whole of said declarations, and the time, place, and manner in which they were made, before whom, and all the circumstances which occurred when such declarations were made.

5th. State how long before his death you saw the said Daniel Clark for the last time; how long before his death he spoke of his last will, and what he said relation to his aforesaid child.

6th. State whether you ever heard any one say he had read the said will; if so, state whom, what was said, and whether the said person is now living or not.

(Signed) WM. M. WORTHINGTON,
For Pl'ffs.

Cross-examined:

174 1st. Each witness examined and answering any one of the foregoing interrogatories is desired to state his name, age, residence, and employment, and whether he is in any manner connected with or related to any of the parties to this suit, or has any interest in the event of the same.

2. How long did you know Daniel Clark, and under what circumstances? and if you presume to state that Daniel Clark left any child at his death, state who was the mother of said child and who was the husband of that mother. State all the circumstances fully and in detail, and whether said Clark was ever married; if so, to whom, when, and where.

3. If said Clark ever acknowledged to you that he suffered himself to be father of a child, state when and where he made such an acknowledgement, and all the circumstances of the recognition of such a child or children, and whether the act was private or public.

4. Did said Clark consider you as an intimate friend, to whom he might confide communications so confidential as those relating to his will? If aye, state what you know of your own personal knowledge of

the contents of said will, and be careful, if you please, to distinguish what you state of your own knowledge and what from hearsay.

175 The defendants propound the following interrogatories, with a full reservation of all legal exceptions to the interrogatories in chief, the same not being pertinent to the issue, and the last of said interrogatories being calculated merely to draw from the witness hearsay declarations.

(Signed) L. C. DUNCAN,
For Def'ts.

Return to commission.

In pursuance of the annexed commission, directed to me, the undersigned, justice of the peace, personally appeared Pierre Baron Boisfontaine, who, being duly sworn to declare the truth to the questions put to him in this cause in answer to the following interrogatories, says:

In reply to the first interrogatory he answers: I was acquainted with the late Daniel Clark, of New Orleans, for and was many years intimate with him.

2d. In reply to the second interrogatory he answers: Mr. Clark left at his death a daughter named Myra, whom he acknowledged as his own before and after her birth and as long as he lived. In my presence he spoke of the necessary preparations for her birth, and asked my brother's wife to be present at her birth, and in my presence he proposed to my sister and brother-in-law, Mr. S. B. Davis, that they
176 should take care of her after her birth. After her birth he acknowledged her to me as his own, constantly and at various places. He was very fond of her and seemed to take pleasure in talking to me about her. When he communicated to me he was making his last will, he told me he should acknowledge her in it as his legitimate daughter. The day before he died he spoke to me about her with great affection, and as being left his estate in his last will. The day he died he spoke to me of her with the interest of a dying parent and as heir of his estate in his last will. She is still living, and is now the wife of William Wallace Whitney.

3d. In reply to the third interrogatory, he answers: About ten days before Mr. Clark's death I was present at his house, when he handed to Chevalier de la Croix a sealed packet, and told him that his last will was finished and was in that sealed packet. About ten days before this he had told me that it was done. Previous to this, commencing about four months previous to his death, he had often told me he was making his last will; he said this in conversations to me on the plantation and at his house, and I heard him mention this subject at Judge Pitot's house. I frequently dined at Judge Pitot's with Mr. Clark on Sundays. The day before he died he told me that his last will was below, in
177 the office-room, in his little black case. The day he died he mentioned his last will to me.

4th. In reply to the fourth interrogatory, he answers: I was present at Mr. Clark's house about fifteen days before his death, when he took from a small black case a sealed packet, handed it to Chevalier de la Croix, and said, My last will is finished; it is in this sealed packet, with valuable papers; as you consented, I have made you in it tutor to my daughter. If any misfortune happens to me, will you do for her all you promised me? Will you take her at once from Davis? I have given her all my estate in my will, an annuity to my mother, and some legacies to friends. You, Pitot, and Bellechasse are the executors. About ten

days before this Mr. Clark, talking of Myra, said that his will was done. Previous to this he often told me, commencing about four months before his death, that he was making his last will. In these conversations he told me that Chevalier de la Croix had consented to be her tutor, in his will, and had promised, if he died before doing it, to go at once to the North and take her from Mr. Davis; that she was to be educated in Europe. He told me that Chevalier de la Croix, Judge Pitot, and Colonel Bellechasse were to be executors in this will. Two or three
178 days before his death I came to see Mr. Clark on plantation business; he told me he felt quite ill. I asked him if I should remain with him. He answered that he wished me to. I went to the plantation to set things in order, that I might stay with Mr. Clark, and returned the same day to Mr. Clark, and stayed with him constantly till he died. The day before he died Mr. Clark, speaking of his daughter Myra, told me that his last will was in his office-room below, in the little black case; that he would die contented, as he had insured his estate to her in the will. He mentioned his pleasure that he had made his mother comfortable by an annuity in it, and remembered some friends by legacies. He told me how well satisfied he was that Chevalier de la Croix, Judge Pitot, and Bellechasse were executors in it, and Chevalier de la Croix Myra's tutor. About two hours before his death, Mr. Clark showed strong feelings for said Myra, and told me that he wished his will to be taken to Chevalier de la Croix, as he was her tutor, as well as one of the executors in it; and just afterwards Mr. Clark told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier de la Croix. After this, and a very short time after Mr. Clark died, I saw Mr. Relf take a bundle of keys from
179 Mr. Clark's armoire, one of which, I believe, opened the little black case; I had seen Mr. Clark open it very often. After taking these keys from the armoire, Mr. Relf went below. When I went below I did not see Mr. Relf, and the office-room door was shut. Lubin told me that when Mr. Relf went down with the keys from the armoire, he followed, saw him then, on getting down, go into the office-room, and that Mr. Relf, on going into the office-room, locked the office-room door. Almost Mr. Clark's last words were that his last will must be taken care of on said Myra's account.

5th. In reply to the fifth interrogatory, he answers: I was with Mr. Clark when he died; I was by him constantly for the last two days of his life. About two hours before he died he spoke of his last will and his daughter Myra in connexion, and almost his last words were about her, and that his will must be taken care of on her account.

6th. In reply to the sixth interrogatory, he answers: When after Mr. Clark's death, the disappearance of his last will was the subject of conversation, I related what Mr. Clark told me about his last will in
180 his last sickness; Judge Pitot and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Mr. Clark had told me about it; that when they read it it was finished, was dated, and signed by Mr. Clark; was an olographic will; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter, and bequeathed all his estate to her, gave an annuity to his mother, and legacies for some friends. The Chevalier de la Croix was tutor *was tutor* of his daughter, said Myra; Chevalier de la Croix, Colonel Bellechasse, Judge Pitot were executors; Judge Pitot and John Lynd are dead; the wife of William Harper told me she read it; Colonel Bellechasse told me that Mr. Clark showed it to him not many days before his last sickness;

that it was then finished; Colonel Bellechasse and the lady, who was Madam Harper, are living.

1st. In reply to the first cross-interrogatory he answers: My name is Pierre Baron Boisfontaine; my age is about fifty-eight; I have been some time in Madisonville; the place of my family abode is near New Orleans, opposite side of the river. I was eight years in the British army; I was several years agent for Mr. Clark's plantation; since
181 his death I have been engaged in various objects; I now possess a house and lots, and derive my revenue from my slaves, cows, &c. I am in no manner connected with or related to any of the parties of this suit; I have no interest in this suit.

2d. In reply to the second cross-interrogatory he answers: I knew Daniel Clark between nine and ten years; I knew him as the father of Myra Clark. She was born in my house, and was put by Mr. Clark when a few days old with my sister and brother-in-law, Samuel B. Davis. I was Mr. Clark's agent for his various plantations; first, the Sligo and the Desert, then the Havanas, the Hema Point, and, when he died, of the one he purchased of Steven Henderson. He respected our misfortunes, knowing that our family was rich and of high standing in St. Domingo before the revolution. The mother of Myra Clark was a lady of the Carrière family; not being present at any marriage, I can only declare it my belief that Mr. Clark was her husband. To answer this question in detail, as is demanded, it is necessary that I state what was communicated to me; it was represented to me that this lady married Mr. De Grange in good faith, but it was found out some time afterwards that he already had a living wife, when the lady, nee Car-
182 rière, separated from him. Mr. Clark, some time after this, married her at the North; when the time arrived for it to be made public, interested persons had produced a false state of things between them; and this lady, living in Philadelphia, and Mr. Clark not there, was persuaded by a lawyer employed that her marriage with Mr. Clark was invalid, which believing, she married Monsieur Gardette. Some time afterwards Mr. Clark lamented to me that this barrier to making his marriage public had been created. He spoke to me of his daughter Myra from the first as legitimate; and when he made known to me that he was making his last will, he said to me he should declare her in it as his legitimate daughter. From the above I believe there was a marriage.

3d. In reply to the third cross-interrogatory he answers: Mr. Clark made no question on this subject before and after her birth, and as long as he lived he exercised the authority of a parent over her destiny. He was a very fond parent. He sustained the house of Mr. Davis and Mr. Harper, because my sister had her in care, and Mrs. Harper suckled her. He sustained Harper as long as he lived, and conferred great benefits on my brother-in-law. He spoke of her mother with great respect, and frequently told me, after her marriage with Mr. Gar-
183 dette, that he would have made his marriage with her public if that barrier had not been made. He frequently lamented to me that this barrier had been made, but that she was blameless. He said he would never give Myra a step-mother. When, in 1813, he communicated to me that he was making his last will for her, he showed great sensibility as to her being declared legitimate in it. When I was with him at his death sickness, and even at the moment he expired, he was in perfect possession of his senses, and no parent could have manifested greater affection than he did for her at that period. Nearly his last words were about her, and that his will must be taken care of on her

account. She, the said Myra, is the only child Mr. Clark ever acknowledged to me as his. She was born in July, eighteen hundred and five.

4th. In reply to the fourth cross-interrogatory he answers: I was a friend of that confidential character. From the time of said Myra's birth, Mr. Clark treated me as a confidential friend in matters relating to her and to his affairs generally. In reply to the fourth interrogatory I have stated what I know concerning Mr. Clark's last will; my recollection of these facts is distinct. The circumstances connected
184 with them were of such a character that my recollection of them could not be easily impaired.

(Signed) BARON BOISFONTAINE.

Which answers being reduced to writing, were sworn to and signed by the said witness in my presence.

In testimony whereof I have hereunto set my hand and private seal at the parish of St. Tammany, in the State of Louisiana, this twenty-ninth day of May, eighteen hundred and thirty-five.

(Signed) [SEAL.] DAVID B. MORGAN,
Justice of the Peace.

Testimony under commission of J. D. D. Bellechasse.

In the district court of the United States for the eastern district of the State of Louisiana. In chancery.

WILLIAM W. WHITNEY AND MYRA C. WHITNEY, complainants,
against
RICHARD RELF, BEVERLY CHEW, AND OTHERS, defendants.

Interrogatories propounded on behalf of the complainants to Joseph Deville Degontin Bellechasse, Mrs. Harriet Smith, Samuel B. Davis, Mrs. Eliza Clark, and Chevalier de la Croix.

1st. Were you acquainted with the late Daniel Clark, of New Orleans?

185 2d. Were you or not at any terms of intimacy with him, and did you or not enjoy his confidence?

3rd. Did you know or not whether the said Clark, at the time of his death, left any child living? If so, state who that child is, how you derived your information or knowledge on the subject, and particularly all that you may have heard the said Clark touching that matter, and his conduct toward, and treatment of, said child.

4th. Do you know whether or not the said Clark, at any time during his life, made any provisions for said child? If so, state particularly all you know upon that subject.

5th. If you have any information or knowledge touching a will of said Clark made about May, 1811, relate all you may know of the said will, and the circumstances under which it was made, or whether or not the said Clark did not thereafter express his determination to make another will. State all you may have heard him say upon that subject.

6th. Did or did not the said Clark make a last will and testament about the year 1813? State all you may know touching the matter, or what you may have heard from him relative thereto, and the contents of the will, as far as you can recollect.

7th. If you know anything further material to the controversy herein, and of interest to the complainants or defendants, relate it.

(Signed) GRYMES, CHINN, &c.,
For Complainant.

186 Filed 6th February, 1837.
(Signed) T. W. COLLINS,
Deputy Clerk.

In the district court of the U. States in and for the eastern district of Louisiana. In equity.

WILLIAM W. WHITNEY AND MYRA C. WHITNEY *vs.* RICHARD RELF AND BEVERLY CHEW AND OTHERS.	No. 3823.

Cross-interrogatories to the interrogatories filed by the complainants on the 6th February, 1837, and by them propounded in their behalf to Joseph Deville Degontin Bellechasse, Mrs. Harriet Smith, Samuel B. Davis, Mrs. Eliza Clark, and Chevalier de la Croix.

The commissioner who may receive the answers to the interrogatories of the plaintiffs, and to the following cross interrogatories, is notified that it will be required of him to certify that the several interrogatories and cross-interrogatories were answered by the deponents separately and apart from each other and from other persons, and that neither the chief nor cross questions were shown to or read to the deponents, or to or by either of them; and that each question under each separate chief and cross interrogatory was answered in the order in which the several questions are propounded; and that he did not permit any deponent to see or read any succeeding interrogatory until his answer to the preceeding had been fully taken down, and especially that no com-
187 munications or suggestions were made in the presence of the commissioner, or, to his knowledge or belief, by any attorney or agent of either of the parties to either of the deponents; and also to certify that he carefully cautioned each witness to distinguish accurately in each answer what he or she stated from his or her personal knowledge, and what from hearsay, and let it be so written down in the answers what is of personal knowledge and what of hearsay.

The complainants are notified that all legal exceptions are reserved to each one of their interrogatories, and especially do the respondents in propounding these cross interrogatories reserve to themselves to demur, plead, or answer hereafter as they shall be advised, and at all times to charge and show that this honorable court hath not, either in equity or at law, any jurisdiction of the matter of the present bill of complaint, the same being only cognizable by the probate court of the parish of Orleans, in the State of Louisiana, which court is already seized of the succession of Daniel Clark, the pretended ancestor of the complainant, Myra, the same being a court where a plain, adequate, and complete remedy may be had at law by the complainants for any and all their supposed claims against the succession of the said Daniel Clark,
188 and full redress for their many grievances set forth in their said bill of complaint. Protesting, therefore, against this proceeding, and not intending to waive any right, or to admit any claim of the complainants in the premises, but merely desiring and intending to provide

against the effect of error, accident, surprise, or fraud, and wishing to advertise the complainants of the purpose of such of the respondents only as sign these cross-interrogatories, said respondents here acting in his, her, and their own behalf only, and each one acting for him or her self separately, propound the following cross-interrogatories:

1st. Will you, and each of you, answering any interrogatory of the complainants, state your name, age, and present residence, and where you resided during each year from 1800 to 1814, and state your employment, and mention your means of acquaintance with Mr. Daniel Clark, formerly of New Orleans, and who is said to have married in that city in 1813?

Mrs. Harriet Smith and Mrs. Eliza Clark, two of the witnesses proposed to be examined by the complainants, are particularly requested to state what were their names before marriage; and if they were married more than once, to state the names of their several husbands.

189 2d. If you say you were upon terms of intimacy with Mr. Clark, state, if you please, how you came to be thus intimate with him; when that intimacy commenced, and how long it continued; when it ended, and whether it was interrupted; and if it was, for what cause?

3rd. If you answer the third interrogatory in chief affirmatively, state the sex, name, and age of the child, and when and where the child was born. Be very particular, if you please, in stating these matters with great accuracy, and mention in detail what circumstances enable you to recollect with accuracy the matters about which you are interrogated.

4th. Was Mr. Daniel Clark, about complainants interrogate you, ever married? If you answer affirmatively, state when, where, and to whom, by what priest, clergyman, or magistrate, and who were the witnesses present. Were you among the witnesses; and if so, who was present with you? Answer with great particularity.

5th. If, in answering the sixth interrogatory of the complainants, you say that Mr. Clark made any provisions for the child whom you are asked to state he left at his death, state what that provision was, and in what did it consist—lands, houses, lots, slaves, stocks,
190 bonds, mortgages, or what. State particularly and mention the amount, and state how you happen to know all these matters.

7th. Will you state whether you have ever had any correspondence or conversations with the complainants, or with either of them, on the subject of the pretensions of the complainant, Myra C. Whitney, to be the daughter and heiress of the estate of Mr. Daniel Clark; and if you have had any correspondence, annex it to your answer; or if any such conversation, state the nature of it, what was desired, and what it was intimated to you it was important you should prove; mention when you last saw the complainants, or either of them and which of them, and whether you were not then, or at some other time, informed that your testimony would be wanted and required, touching the matters about which you have now been interrogated.

8th. Did you or not ever hear Mr. Clark acknowledge that he had any children in New Orleans; and particularly, did you or not ever hear him acknowledge two female children, the one named Caroline and the other Myra; and is or not that Myra one of the complainants in this case? Did you ever hear him say that he intended to leave, by will,
191 money or property enough to Myra to take the stain off her birth? If you heard him use such expressions, or those of a

similar character, state what you suppose he meant by taking off the stain from the birth of his own legitimate daughter.

9th. Will you state who was the mother of the complainant, Myra, and did the mother nurse Myra? If not, why not? Who did nurse her? Did her mother die and leave her an infant, or was she too sick and too feeble to nurse this child? Did the mother of Myra, the complainant, nurse and raise her or not? If not, who did? Mention particularly and all the circumstances.

10th. If you know when the complainant, Myra, was born, state the precise date and place; and state, if you know, by whom and where she was raised, and whose name she bore, and why she bore that name.

11th. Was not the last will of Mr. Clark admitted to probate in the proper tribunal at New Orleans? If you undertake to say anything about a will which it is supposed Mr. Clark made, either in 1811, in 1813, or at any other time, state nothing but what is of your own personal knowledge, and be careful to avoid stating anything which is of hearsay.

12th. If you state anything about any supposed will of Mr.
192 Clark, or any of its provisions, state whether you are sufficiently acquainted with the ordinances and laws of the Territory of Orleans and State of Louisiana to form a correct opinion as to the legality of the will in form and in its different provisions. Have you ever studied the laws of Louisiana? If aye, how long? If not, how can you express any opinion about them? Have you not frequently conversed with the complainants respecting the supposed provisions of a will supposed to have been made by Mr. Clark in 1813; and if you have, may not the opinion you have expressed to the sixth interrogatory of the complainants be somewhat influenced by such conversations? And state what are your feelings and affections towards the complainants; whether you are related to or connected with either of them; and if you are, how and in what degree or way, and whether you have any interest in the event of this suit.

13th. Will you, Col. Bellechasse and Mr. Dusuau de la Croix, for yourselves personally, in addition to the foregoing interrogatories, be pleased to state whether or not, some time during the year 1810 or thereabout, or some other time between the year 1806 and the period of his death at New Orleans, Mr. Clark, the gentleman about whom you have been interrogated, did not, did or not, convey to you certain lots of
193 ground, situated on what is called the Bayou road, in the rear of the city of New Orleans; and if so, state as nearly as you can recollect the number of those lots, and for what purpose Mr. Clark conveyed them, and whether you have accomplished that purpose; and if so, when? Were not said lots, in fact and in truth, conveyed to you in trust for the complainant, Myra; and if they were, will you be pleased to state what motive induced Mr. Clark to convey property in trust for his supposed legitimate daughter, the sole heiress of his estate?

14th. Will you, Col. Bellechasse and Mr. de la Croix, state further, in addition, whether or not said trusts were not confided to you for the purpose in part of being conveyed to another supposed natural child of Mr. Clark, named Caroline? and if so, state whether or not the same has been so conveyed to said Myria and Caroline.

15th. Will you, Col. Bellechasse, particularly, and in addition, for yourself individually, state whether or not, some time during the year 1822, and at other times, you corresponded on most friendly terms with

Mr. Richard Relf, one of the respondents in this case, and whether you ever alluded to two female children, named Myra and Caroline, of whom Daniel Clark supposed himself the father? And state particularly
194 if you recollect having used in one of these letters to Mr. Relf such expressions as the following: "Né amoins et relativement à Melle. Caroline, je puis dire et même jurer que Clark avait une trop belle ame, et le cœur trop bien placé, pour avoir été capable, ayant deux enfants qu'il adorait, d'en avoir voulu favoriser une en laissant l'autre exposée à mendier son pain et livrée aux vicissitudes qu'entraine la misère." Will you now, sir, be pleased to state, if you could say, and were, indeed, ready to swear in 1822 and at other times, that Mr. Clark had two children, whom he adored, one of them named Caroline, how you can declare that the complainant, Myra, is the legitimate daughter and only daughter of Mr. Daniel Clark? If you had occasion to change your opinions on these points, state when you so changed your mind, and what reasons induced such change. Mention the names of the persons who induced such change, and when you first knew or believed Mr. Clark was a married man.

16th. To Mrs. Harriet Smyth, particularly, and in addition to the first twelve interrogatories: Will you, madam, be pleased to state whether you knew the mother of Myra, the complainant, intimately; and if so, how long, and whether you associated familiarly with her? Pray mention whether you were present at the birth of Myra, and whether
195 you saw the child frequently after her birth and how soon thereafter. State also whether Myra was nursed by her mother; if not, why not; and by whom nursed and why, and whether also Myra's mother was known and received publicly in New Orleans as the lawful wife of Mr. Daniel Clark, and whether you knew or believed then that Mr. Clark was married to Myra's mother. If you did know of any such supposed marriage, did other persons know the facts as well as yourself; if so, who? Mention the names of all persons whom you may recollect who knew these matters as well as yourself. State all circumstances with great particularity.

17th. To all the witnesses: Will each one of you, answering any one of these direct or cross interrogatories, state whether you have seen, examined, read, or heard read, any one of them, or copies of them, at any time or place, before you were called upon by the commissioner to answer them? If aye, state where, when, and by whom they were thus so shown or read to you, or by you, and for what purpose. State also, each one of you, whether you have had any conversation or correspondence, within the last three or four years with the complainants or with either of them, respecting their supposed claims against the estate of the late Daniel Clark; and if you answer affirmatively, state why,
196 when, and where such conversation or correspondence occurred, and the nature and amount of them, so far as your memory will serve you, and who was present at such conversations. If you have any letters from the complainants or from either of them on the matters referred to in these direct and cross interrogatories, annex them to your answers, if possible, and if not possible, state why; and then, if you have preserved and cannot annex them, give true extracts of them; and if that be not possible, state your recollections.

18th. What is your maternal language? If not English, do you understand that language perfectly; and if you do not understand English, how

have you contrived to answer these chief and cross interrogatories? Who has translated them to you?

(Signed) L. DUNCAN,
For Richard Relf and Beverly Chew.
J. J. MERCIER,
For the Mayor and Aldermen of New Orleans, Souiat Dufossat, and Louis Desdemes.
R. M. SHEPHARD,
For P. O. Sorte and Rene Lemonier.
T. A. ROST,
For Maria Holiday and Desuau de la Croix.
H. LOCKETT,
For James Field.
ISAAC PRESTON,
For Widow Lambert and Luke Vigneau, Charles Patterson, Mr. Calway, Charles Fonde, Belfine Berdule, Antoine Pienias, John Mathew, Ranson Mansaua, and Manuel Marquez.

197 (Signed) JOHN SLIDELL,
For John Minturn, George Kenner, and Duncan Kenner.
JULIEN SEGHERS,
For F. O. Petitpain, Claude Reine Samory, and Louis Lallande Ferner.

(Indorsed:) Filed 9th March, 1837.
(Signed) T. W. COLLINS,
Deputy Clerk.

CLERK'S OFFICE, *United States Court.*

I do hereby certify the foregoing to be a true and correct copy of the originals on file in this office.

New Orleans, this 5th August, 1857.
(Signed) T. W. COLLINS,
Deputy Clerk.

To the first interrogatory. 1st. I knew the late Daniel Clark, of New Orleans.

To the second interrogatory. 2d. I enjoyed his confidence and friendship for many years.

To the third interrogatory. 3d. I knew, from what Clark told me in repeated conversations, that he had a daughter named Myra, now the wife of W. W. Whitney, and that he treated her with the utmost paternal affection. Clark carried me with him on divers occasions to see Myra, and in my presence he manifested for her the most ardent love. Said Daniel Clark always gave me to understand as well by reason of his extraordinary affection for said Myra, as by his positive declaration to that effect, that she would be the heiress of his fortune.

198 To the fourth Interrogatory. 4th. In 1811, when said Clark was about to make a visit to the north, in a formal act or deed of sale before a notary public, he conveyed to me some lots, perhaps fifty, as if I had paid the due price for them, when, in truth, nothing had been paid, for the sale was made with or under the confidential understanding that I should hold them for the sole use and benefit of said Myra, in the event of the said Clark before his return.

To the fifth interrogatory. 5th. That in the same epoch, in 1811, said

Clark made known to me that on account of a special emergency that called him to the north he had made a will (to the best of my recollection, in the month of May in that year) which he merely designated as a provisional will, in which Richard Relf and Beverly Chew were named as executors, and that although he did not mention his said daughter Myra in that will, yet by confidential modes he had amply provided for her, and that will said Clark told me he had deposited in the hands of said Relf. On the return of said Clark, I wished to reconvey to him the said lots, but Clark would not allow me to do so, wishing, as I suppose, to give another proof of his confidence in my honor and
199 rectitude, particularly as he, Clark, never wished to receive any written acknowledgment of the confidential nature of said sale.

To the sixth interrogatory. 6th. That in the year 1813, said Clark told me he was thinking of reducing to order his affairs, that were various and complicated, and of making his last will, so as not to leave any longer exposed to risk the standing and fortune of his child, and that he wished me to consent to become one of his executors; I did so consent. Said Clark spoke of Judge Pitot and Chevalier de la Croix as persons whom he contemplated to have associated with him. With much reflection and deliberation said Clark spoke of his being occupied in preparing his last will. On these occasions, in the most impressive and emphatic manner, he spoke of the said Myra as the object of his last will, and that he should in it declare her to be his legitimate child and heiress of all his estate; and he accordingly so made his last will. A very short time before the sickness that ended in his death, he, Clark, conversed with us about his said daughter Myra in the paternal and affectionate terms as theretobefore; he told us that he had completed and finished his last will. He, Clark, therefore took from a small black case his said last will, and gave it open to me and Judge Pitot
200 to look at and examine. It was wholly written in the handwriting of said Daniel Clark, and was dated and signed by the said Clark in his own handwriting. Pitot, De la Croix, and myself were the executors named in it, and in it the said Myra was declared to be his legitimate daughter and the heiress of all his estate. Some short time afterwards I called to see him, Clark, and learned from said Relf that the said Clark was sick in bed, too sick to be seen by me. However, I, indignant at an attempt to prevent me from seeing my friend, pressed forward into his room. He, said Clark, took me by the hand, and with affectionate reprehension said, "How is it, Bellechasse, that you have not come to see me before since my sickness? I told Relf to send for you." My answer was that I had received no message or account whatever of his sickness from Relf. I said further: "My friend, you know that on various occasions I have been your physician, and on this occasion I wish to be again." He looked at me and squeezed my hand. Fearful of oppressing him, I retired, and told Relf that I would remain to attend occasionally to Clark. Relf said there was no occasion for it; that the doctor or doctors had ordered that he, Clark, should be
201 kept as quiet as possible, and not be allowed to talk. I expressed apprehension for the situation of Clark, but Relf expressed a different opinion, and on his, Relf, promising to send for me if there should appear to be any danger, I departed. On the next day, without receiving any message from Relf, I went and found Clark dead. I continued my way till I reached Pitot's, whom I found much affected by the death of Clark, and very indignant at the conduct of Relf as well for having always prevented the assistance of Clark's friends, as for not having notified them, particularly him, Pitot, who lived near Clark, of his ap

proaching dissolution, that by their presence the fraudulent suppression of the last will of Clark might have been prevented. "What!" I said, "has Clark's last will disappeared?" "Yes, my friend, it was not in the case in which he had placed it, and the succin't and provisional will of a dozen lines which he previously made when about sailing for the north, and which he delivered to Relf, has been brought forward by Relf. Pitot, as well as others, always spoke with the utmost indignation of the fraudulent suppression or destruction of the said last will of 1813, and the fraudulent substitution in its place of the provisional will of 1811, all of which we attributed to interested villany.

202 7th. To the seventh interrogatory. In the autumn of 1831 I saw in a newspaper a letter of said Relf, being an answer to some remarks on the verdict that had been awarded against him in a suit with R. R. Keane for libel in accusing him, Relf, with the suppression of said Daniel Clark's last will and embezzlement of his estate. In that letter said Relf declares that said Myra, if she be the child of said Clark, is the offspring of an adulterous bed. Knowing that this was a calumny, and a most shocking one, on the name and memory of my deceased friend, and a most cruel and wicked one on the birth and name of his child, I, the contemporary of Clark, and acquainted with the facts, wrote to Mr. Whitney that this statement of said Relf was untrue, and that before the birth of said Myra, De Grange had been condemned for bigamy in marrying Miss Carriere, and requested that my letter be published. Mr. Whitney did not think proper to publish this letter, which I regret, as I feel that justice has not been rendered the grave of my departed friend, against whom, if living, no one would have uttered such a calumny. Dead, Mr. Relf is the last person who should asperse

203 his ashes, for though he had withdrawn his confidence from him, still Mr. Relf had received from him not only the greatest pecuniary favors, but, taking him out of obscurity and indigence, Clark, with the nobleness of soul which distinguished his character, extended to him his kindness. I was the shocked with this statement of Relf because Relf knew to the contrary. I think it my duty now to declare, what I know to be a fact, that said De Grange was condemned for bigamy in marrying Miss Carriere (subsequently the mother of Myra) several years prior to the birth of said Myra. The prosecution and condemnation of said De Grange for said crime of bigamy took place at New Orleans towards the close of the Spanish domination in Louisiana. His first and lawful wife, whom he had married previous to his coming to Louisiana (as it was proved), coming to New Orleans in pursuit of him. When said De Grange practiced the infamous deception of marrying Miss Carriere, it was the current opinion in New Orleans that he was a bachelor, or a single man.

To the cross-interrogatories he answers:

1st. To the first cross-interrogatory. My name is Joseph Deville Degontier Bellechassee. I was born in Louisiana in 1760, and fol-

204 lowed the profession of arms there until it was transferred to the United States. After the transfer to the United States I held various important civil and military offices under the American Government, and managed my own affairs, which were extensive, and related principally to real estate. I continued to live in Louisiana until 1814, and then established myself in this island, where I reside on my sugar estate, and enjoy the rank of lieutenant colonel in the service of Her Majesty the Queen of Spain. My means of acquaintance with said Clark were various—friendly intercourse, business connexion, and political connexion.

2d. To the second cross-interrogatory. My friendship and intimacy with said Clark began towards the end of the last century, and lasted with uninterrupted harmony and confidence till his death, which happened in August, 1813. I was intimate and intimately connected with him under a variety of circumstances. For several years previous to the transfer of Louisiana to the United States, I had been in the habit of the greatest intimacy with said Clark. This was commenced, I suppose, by our liking each other, and was cemented and made permanent by proving ourselves worthy of confidence and friendship. Our business and political connexion only drew closer the cords of friend-
205 ship. Such was my respect for him, said Clark, that when, in November, 1803, I was solicited by the French colonial prefect, Mons. Lainsat, to accept the command of the militia of the province of Louisiana, then about to be delivered to him by Spain, and not knowing with what view the prefect was actuated, resisted his offer and communicated the same to Daniel Clark, then United States consul of New Orleans, who disapproved of my refusal, and earnestly recommended that, if it was not too late, I should accept the proffered command, giving as a reason that he believed the tranquility of the country would be insured by so important a trust being confided at such a juncture to a man attached to good order, and who possessed the confidence of his fellow-citizens, and that he was persuaded such conduct would be agreeable to the Government of the United States; in consequence of which, I informed the prefect that I would take the command of the militia, which was given me, as soon as Spain surrendered the country. So also when the American commissioners arrived in New Orleans and possession of that city was given to them, I yielded to the wishes of said Clark in accepting the command of the militia then again offered me. I was one of those intimate friends whom, in 1806, said Clark assembled at his house, and after informing them of the imputed intentions of Colonel
206 Burr, advised to exert their influence with the inhabitants of the country to support the United States Government; and notwithstanding the incapacity of the governor, to rally around him and afford him every aid, and to prevent, if possible, a meeting of the legislature, in case Colonel Burr should gain possession of the city and such meeting should be called and attempt to assemble, regretting that he must leave for Washington. I was a member of the legislative council of Louisiana, and I was a member of the convention that assembled in 1812 and framed the constitution of that State. Said Daniel Clark was the head of that political party of which I belonged. I have explained at least some of the causes and circumstances of my intimacy with Clark.

3d. To the third cross interrogatory. The said Myra, the daughter of the said Daniel Clark, was born in New Orleans, as well as I can recollect, in 1806.

4th. To the fourth cross-interrogatory. I cannot swear that Clark was married to Miss Carriere, the mother of his child, although many persons affirmed that such was the fact; but I am well assured that if he was not married to her, he was never married to any other woman.

5th. To the fifth cross-interrogatory. If Clark had been mar-
207 ried to Miss Carriere, the cause for concealing his marriage might have been found, perhaps, in the suggestion of his pride, alarmed on account of her misfortune, resulting from the deception practiced upon her by said DeGrange, when, according to his coat of arms (which he did not fail to lay considerable press upon, though he was a republican citizen), he carried his pedigree up to the ancient kings of Ireland.

6th. To the sixth cross-interrogatory. From said Daniel Clark himself, in repeated conversations, and from his last will of eighteen hundred and thirteen, I know that he, said Clark, left his daughter Myra all his estate, which consisted of plantations, of lands of immense value, of numerous slaves, of many debts that were due to him, and other various classes of property, which altogether made him a man of great wealth.

7th. To the seventh cross-interrogatory. To fill my secret duty towards said Clark and his daughter, said Myra, I wrote and sent her, many years before I saw her in Matanzas, in 1833, two letters by a safe conveyance, to Philadelphia, one of which went to the care of Colonel Davis, with whose wife said Myra was then living, and the other was directed to the care of Mrs. Hulings, of same city. In these letters I informed her of the confidential trust held by me for her from her
208 father, and of the fraudulent suppression of her father's last will, made in her favor; but neither of these letters, although sent by a safe conveyance, got into her hands, as she assured me afterwards in Matanzas. In that place I spoke at length with her and her husband of her rights and of the cruel suppression of those rights. Since that time I have never seen them; but I often afterwards wrote to them both, particularly to console them both, particularly to console them for the cruel imprisonment which Mr. Whitney had suffered in New Orleans for taking some preliminary steps for the investigation of his wife's rights. On some occasions I wrote to them again, always assuring them of my friendly and almost paternal feeling towards the child of my old friend. With great pleasure I would see all my letters published; but as I am ignorant of any right on the part of Mr. Relf, and those who are associated with him in this cause, to wrest from me private letters written in the way of mere friendship (now that there is no inquisition in the Spanish dominions, and if there should be a holy office in Louisiana, I am not subject to its jurisdiction), I am not disposed to acquiesce in *in* so unreasonable a pretension, even if I retained copies of my own letters, and the letters themselves that have been written to me, neither of which I am not quite certain is the case. But I give full permission to
209 Myra and her husband to publish or carry into court for judicial inspection any letters which I may have written to them, or either of them.

8th. To the eighth cross-interrogatory. I never heard said Daniel Clark speak of having any other child besides the said Myra; I never heard him say that she was a natural child; I never heard him speak of any stain upon her or her birth, but on the contrary he styled her, in his will of 1813, his legitimate daughter; he told me that she was his only child.

9th. To the ninth cross-interrogatory. The answer to the cross-interrogatory No. 9, in reference to the mother of Myra, is anticipated in the answer to the interrogatory-in-chief No. 7. I saw said Myra in her childhood in the house of Mrs. Davis, a respectable lady, the wife of Colonel Davis, to whom Clark had rendered many favors. Said Clark never made known to me his motive for placing said Myra under the care of Mrs. Davis.

10th. To the tenth cross interrogatory. Said Myra Clark was born in New Orleans, according to the best of my recollection, in 1806, and lived with Mrs. Davis, as just mentioned. I always thought and be-
210 lieve that in the lifetime of her father, said Daniel Clark, she bore his name.

11th. To the eleventh cross-interrogatory. The last will of said Daniel

Clark, made in 1813, was never admitted to probate in New Orleans, or in any other place, but that will was fraudulently suppressed, and Clark's old provisional will of a dozen lines, of 1811, that was deposited in the hands of said Relf, was the one which he, Relf, delivered up for probate, instead of the last will of Clark, of 1813.

12th. To the twelfth cross-interrogatory. My profession was that of a military man, and not of a lawyer; yet from my extensive business transactions in Louisiana, from the civil offices which I held under that government, from my duties as a member of the legislative council of Louisiana, from my associations, &c., I became acquainted with many of the laws of that country, and on so plain a subject as an olographic will I consider myself competent of judging of the legality of such will. The last will of Clark, viz, his will of 1813, was legal in form because it was written wholly in his (Clark's) handwriting, and was dated and signed by him. It was legal in its provisions because Clark had the power, even supposing his child not born in marriage, of giving
211 her all the rights of a child born in marriage, by declaring her in his last will his legitimate daughter; for she had the capacity of acquiring those rights, as the bigamy of DeGrange in marrying Miss Carrière left her in free condition, and Myra was born several years after the detection and establishment of DeGrange's bigamy in marrying Miss Carrière, the mother of Myra. This was the plain and positive law of Louisiana, and known to be so by every intelligent person. The subject of one's last will is a subject which he soon makes himself acquainted with when there is a sufficient motive. Few men were equal to Clark in talents and intelligence. He was well instructed in the principal matters that appertain to a gentleman and the proprietor of vast possessions; and the future happiness, fortune, and standing of his child were the objects dearest to his heart, and he satisfied himself that there was no obstacle to his bestowing his fortune upon her. Pitot, the judge of the court of probates at New Orleans, were one of the executors of Clark's last will, viz, that of 1813. Pitot examined the said will after it was finished, and he should have known whether the said last will of Clark was legal in form and in its provisions. Few lawyers in Louisiana were better acquainted with the laws than Clark; and
212 had he not been, he numbered among his intimate friends some of the ablest lawyers of that State, and he was the last man to neglect any means necessary to accomplish an object which he was so intent upon. I consider myself capable of relating fact with which he is acquainted with as much clearness (though less ornament) as any jurisconsult. I am not related to or connected with the complainants, or with either of them. I have no interest in the event of this suit. It would be impossible for me to receive impressions about a subject with which I am familiar, and so peculiar a kind as this, from other persons, much less from those who would have to come to me for information. My only desire is that the issue be conformable with justice.

13th. To the thirteenth cross-interrogatory. In 1811, by a formal act of sale before a notary public, Clark transferred to me some fifty lots of ground within the limits of New Orleans, near the bayou road of St. John, and acknowledged the receipt of a due legal consideration for the same. But it was confidentially understood that the lots so sold and conveyed to him were for Myra, and her alone, and that to her he would convey them, in the event of his, Clark's, death before his return from the North; for he was then about to make a visit there.
213 After his return, I wished and offered to reconvey to him the aforesaid lots, but Clark would not allow me to do so; thus evinc

ing his delicacy and the full confidence he had in my honor and integrity. I understood that about the same time, in 1811, Clark made trusts for his child with other friends; that he made a deposit with Mr. De la Croix: and that, with or under a receipt, he deposited in the hands of Col. Davis title-paper for real or immovable estate or property and claims due to him, of great value, for Myra. Respecting the motive of Clark in acting thus, I am of opinion that Clark, overtaken by a sudden emergency, and with or without cause, doubted of the integrity of Relf & Chew, and of their good faith towards him in the management of his affairs; and being aware of the uncertainty of life, placed out of the reach of those persons, Relf & Chew, the interests of his daughter, by means of said confidential trusts and deposits of titles, when he made his summary will, viz, of 1811, of some dozen of lines, and put into Relf's hands, calling them in it his executors. And this summary was true will, as he feels assured, because the emergency that called Clark to the North was so sudden as not to allow him to make a detailed will like that of 1813.

214 14th. To the 14th cross-interrogatory. That Mr. Clark never intrusted any to me but for his daughter Myra, whom he acknowledged to be his daughter.

15th. To the fifteenth cross interrogatory. It will be necessary to enter into many details in answering this interrogatory. Mr. Clark had always been a patriot and an enthusiastic lover of liberty, and under the influence of these feelings always refused to become a Spanish subject; and when the United States acquired Natchez, he became a citizen of that country, although he continued to reside in Louisiana. On various occasions he exerted his influence in favor of that country at the hazard of his life and fortune. With that sagacity and foresight for which he was so distinguished, said Clark appreciated the physical advantages of Louisiana, and pressed upon the U. S. Government the importance of purchasing that territory. At great expense and labor he procured information concerning the interior forwarded to that government the result. For their benefit he translated from the Spanish and French into English original documents. He pointed out the future value and greatness of that region, and at length the American Government was stimulated to obtain it. The United States owe the acquisition of Louisiana to Daniel Clark. Previous to the purchase of Louisi-
215 ana by the United States, he possessed an ascendancy over the people of Louisiana, and they, deriving their opinions principally from him, passed under the American Government with the strongest impressions of its wisdom and justice. But, unhappily, the governor appointed the province of this important period was very weak-minded, and the policy adopted was neither wise nor conciliatory. Jealousies and almost civil strife were the immediate consequences, and bloodshed was often prevented solely by the personal interposition of said Clark. Such was the weight of his character, such the purity and greatness of his mind. The final effect of this was to produce hostility between said Clark and Governor Claybornе, and two political parties arose, one sustained by all the influence of a governor invested with the almost absolute powers of a Spanish governor, and by the aid of the general government; and after said Clark, in obedience to a call on him in Congress, exposed General Wilkinson's corrupt practices, by all the influence he could add, the other party rallied under Mr. Clark, whose power consisted in his great talents, great name, and the unlimited confidence reposed in his opinions and integrity. Such characters as Edward Livingston moved subject to Mr. Clark's

orbit. I was a native of Louisiana, and it so happened that I
216 had, or was considered to have, extensive influence, and I was
the intimate friend of Clark, politically as well as personally; consequently I shared in the political warfare, and I experienced a large share of the hostility and hatred that were felt for him, and after his death was transferred to me. After said Clark's death I left New Orleans on business, and while absent said Relf made known to me that my enemies had now devised what they would have been far from doing if I had been present—a wicked scheme, by which they hoped and expected to destroy my fame and fortune, and perhaps my life; that I was charged with no less a crime than I had gone to lead the British to New Orleans; that I was denounced to be taken dead or alive; that such tyranny then ruled in New Orleans that my life would be the certain forfeit of returning at that time; and that he, Relf, risked his own safety in making this communication. The charge was absurd and ridiculous enough, when I had left my family and fortune behind me in Louisiana; but after the bitter warfare and hatred to which I had been so many years exposed, I readily believed my enemies capable of any
injury or injustice to me, however base and black, and I did be-
217 lieve that Relf had written the truth, and could not help entertaining grateful feelings towards him. Thus kept away from New Orleans, I was ruined in the mean time by the fraudulent conduct of my agent there. At a subsequent period I wrote to said Relf, to Colonel Davis, to Mr. Dubourg, Mr. Edward Livingston, that I might have said Myra put into possession of the aforesaid lots. Thinking that said Relf would feel remorse for the great injury and injustice he had committed against the said Myra, in suppressing her father's last will, I expected he would cheerfully invest her with the same. But I was deceived. In a letter written by Relf to me in 1822, he professed to give the news (as indeed it was altogether new information) of another daughter, called Caroline, of Clark's, which daughter he, Clark, (as Relf affirmed) had placed in a boarding school at the North, under the care of Mr. Hulings, and represented it as his opinion that she was entitled to the half of the aforesaid lots of Myra; and said Relf, in said letter, requested me to annul the act made by said Clark, and put him, Relf, into possession of the same. In answer to that letter, he having before him this new advice of the extension of Clark's paternity to Caroline, and speaking in a conditional or hypothetical sense, said that
Clark had a soul too good and a heart too well placed, having
218 (according to Relf) two daughters to be loved and adored by him
as a father; that upon this supposition his affectionate heart and generous soul would not abandon the other. In my letters previously written I had positively declared that said Clark had only designated said Myra; but as Mr. Relf holds my letter, why does he not present it to judicial view? I not only give permission to publish that letter, but any other that he can hold of mine, including that which I wrote to his brother-in-law, Mr. Zacharie, in 1835, respecting a judicial declaration made by me in the libel suit of Relf against R. R. Keane.

16th. To the sixteenth: That Mrs. Smith's answer is only required for the cross-interrogatory No. 16.

17th. To the seventeenth: Before I became notified of the foregoing interrogatories and cross-interrogatories by the commissioner, I never saw them nor heard them read; consequently, could not have examined them. Respecting my correspondence and conversations, I refer to my answer given to the cross-interrogatory No. 7.

18th. To the eighteenth: I was educated in Louisiana; both the

Spanish and French languages were current there, so that I can
219 say that both are my maternal tongues. My knowledge of the English language is limited; but as I have three daughters, one son, and two sons-in-law who understand it, and some of them perfectly well, when I require an English translation, I avail myself of the services of some one or more of my own family.

(Signed) JOSEF DEVILLE DEGENTIN BELLECHASSE.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
Eastern District of Louisiana.

I certify that the foregoing seventeen printed pages and seven printed lines contain and form a full, complete, and true copy of the original deposition of Joseph Deville Degentin Bellechasse, on file in the cause of Myra Clark Gaines vs. Relf, Chew and als., No. 122 of the docket of this court.

Witness my hand and seal of said court, at New Orleans, this 15th Feb., 1855.

[SEAL.] (Signed) J. W. GURLEY, *Clk.*

220 *Submission of case as to Mrs. Kenner, November term,* 1877.

NEW ORLEANS, *Thursday, April* 18*th*, 1878.

Court met pursuant to adjournment, present Hon. E. C. Billings, district judge.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX, MRS. ELIZA KENNER, ET AL. } No. 3663.

And now in open court came Wm. Reed Mills, for complainant, and J. D. Rouse for defendant, Mrs. Eliza Kenner, administratrix, &c., and submitted this cause on the bill, answer, replication, exhibits, and proofs.

Decree.—Entered and filed June 10*th*, 1878.

MYRA C. GAINES
vs.
P. H. MONSSEAUX ET AL. } No. 3663.

This cause came on to be heard on the bill, answer, replication, proofs and exhibits in the cause and was argued by counsel. On consideration whereof, it is ordered, adjudged, and decreed that Myra Clark Gaines, complainant in the same, is the only legitimate child of Daniel Clark, in the said bill and proceedings mentioned, and, as such, was exclu-
221 sively invested with the character of such legitimate child, and entitled to all the rights of the same, and that under and by virtue of the last will and testament of Daniel Clark, the said Myra Clark Gaines is the universal legatee of said Daniel Clark, and, as such, to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein mentioned.

And this court doth further order, adjudge and decree, that all the property described and claimed by the defendant, Eliza Davis, widow of Minor Kenner, tutrix of Daniel Kenner, Maria Kenner and Oxley

Kenner, the minor children of the said Minor Kenner, and acting as the administratrix of the said Minor Kenner, in her answer and exhibits thereto annexed, to wit:

A parcel or tract of land situated in Kennerville, so called, in the State of Louisiana, about five leagues above the city of New Orleans (as the boundaries of said city was in 1836), on the left bank of the Mississippi river, bounded on the upper side by lands owned in October, 1813, by William Kenner, and extending in front of the Mississippi river eighteen and one-half arpents (18½) and on the lower side bounded
222 by lands owned in October, 1813, by Jacque Fortier, and extending in the rear on both sides to Lake Pontchartrain, with all the improvements thereon, having been purchased by Daniel Clark aforesaid, from Stephen Henderson, by act passed before John Lynd, then notary public, on the 16th December, 1812, is part and parcel of the property comprising the succession of the said Daniel Clark, to wit: the same which Thomas Beale, register of wills, and Richard Relf, executor by proces-verbal of adjudication, on the 8th of November, 1813, and said Richard Relf, executor by act before Marc Lafitte, notary, on the 11th November, 1813, sold to Michel Fortier, jr., and Omer Fortier, and which by several intermediate conveyances was conveyed to the said Minor Kenner, the deceased husband of said Eliza Davis, who, as widow of said Minor Kenner, tutrix of Maria Kenner, Daniel Kenner, and Oxley Kenner, and acting as administratrix of the said Minor Kenner, is one of the defendants in this cause; that the said Richard Relf and the said Thomas Beale, at the time and times when, under the pretended authority aforesaid, sold the property so described and claimed by the said Eliza Davis, widow, tutrix and acting ad-
223 ministratrix as aforesaid, and when they respectively executed said proces-verbal of adjudication, and the said Relf executed his act of sale as aforesaid to the said Michel Fortier, jr., and Omer Fortier, had no legal right or authority whatever so to adjudicate, to sell and dispose of, or in any manner to alienate the same; that the said adjudication and act of sale to said Michel Fortier, jr., and Omer Fortier were wholly unauthorized and illegal, and utterly null and void, and that all the intermediate conveyances by which the said property was attempted to be transferred and conveyed from the said Michel Fortier, jr., and Omer Fortier, to the said Minor Kenner, were made without any legal right or authority whatsoever to sell or dispose or to pass, convey, or transfer said property, and were wholly unauthorized and illegal, and are utterly null and void, and that the said Minor Kenner at the time when he purchased the property so described and claimed by said Eliza Davis, his widow, tutrix and administratrix, as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Thomas Beale and Richard Relf in the premises illegal, null and void, and of the illegality and defect of the various intermediate transfers of the said property, and that
224 he, the said Minor Kenner, ought to be deemed and held and is hereby deemed and held to have purchased the property in question with full notice that the adjudication and sale under the pretended authority of the said Thomas Beale and Richard Relf, and that the said proces-verbal of adjudication of the 8th of November, 1813, and the act of sale of the 11th of November, 1813, to said Michel Fortier, jr., and Omer Fortier, and the intermediate conveyances of the said property above mentioned, were illegal, null and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree, that all the property held by the defendant, either as widow of said Minor Kenner or tutrix of said Daniel Kenner, Maria Kenner, and Oxley Kenner, the minor children of the said Minor Kenner, or as acting as the administratrix of said Minor Kenner, as aforesaid, now remains unclaimed and undisposed of, as part and parcel of the succession of the said Daniel Clark, notwithstanding said adjudication and sale in the pretended right and under the pretended authority of the said Thomas Beale and Richard Relf.

And the court doth further order, adjudge, and decree, that com-
225 plainant, Myra Clark, as the legitimate and only child of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to the property aforesaid, so claimed and held by the defendant, Eliza Davis, widow, tutrix of Daniel Kenner, Maria Kenner, and Oxley Kenner, and acting as the administratrix of the estate of said Minor Kenner, together with all the yearly rents and profits and value for use accruing from the same since the same came into the said Minor Kenner's possession, and for which the said defendant is hereby ordered, adjudged and decreed to account to the said Myra Clark Gaines, complainant herein.

And the court doth further order, adjudge and decree, that the defendant, Eliza Davis, widow of Minor Kenner, tutrix of Daniel Kenner, Maria Kenner, and Oxley Kenner, the minor children of the said Minor Kenner, and acting as the administratrix of the estate of said Minor Kenner, do forthwith surrender all said propperty so claimed and held by her, as aforesaid, in the hands of the said Myra Clark Gaines, as part of the succession of the said Daniel Clark.

And the court doth further order that the account be taken by E.
226 Sabourin, master in chancery of this court, of the yearly rents, profits, and value for use accrued or accruing from the said property since the same came into the possession of the said Minor Kenner, and that he report the same to this court, the said account to be taken subject to the laws of Louisiana.

It is further ordered, adjudged, and decreed, that the complainant, Myra Clark Gaines, have execution against the defendant, Eliza Davis, widow of Minor Kenner, tutrix and acting administratrix as aforesaid, for costs incurred in this cause.

It is further ordered, adjudged, and decreed, that the complainant have leave to apply for such other or further order, direction, or decrees as may now or hereafter necessary in the premises.

It is further ordered that, as to the right of the complainant for rents, revenues, and value for use, she is entitled to all the income, revenues, profits, and value for use and occupation, which the evidence before the master shall establish she, is owner, would have received or derived, whether the possessor has realized them or not, and whether the failure on said possessor's part to realize them resulted from not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of the possessor, now adjudged to have been
227 unfounded. The proof must establish that, if the complainant had been left undisturbed in the possession of this property which she has now recovered, by ordinary good management she would have

caused the property to produce the incomes which are to be adjudged to her.

June 10th, 1878.

(Signed) EDWARD C. BILLINGS,
Judge.

Agreement as to appeal.—Filed June 20th, 1878.

U. S. circuit court, dist. La.

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It is agreed between complainant and defendant Mrs. Kenner, that the amount of bond required for supersedeas on said defendant's appeal shall be ascertained by J. Ward Gurley, jr., as master, subject to the approval of the chancellor, and if said defendant shall fail to give the bond required for supersedeas within the time required by law, her appeal without supersedeas shall stand, and not be prejudiced by her alternative order of appeal.

(Signed) J. D. ROUSE,
Solicitor for Mrs. Kenner.
WM. REED MILLS,
Solicitor for Myra Clark Gaines.

228 *Motion and order of appeal.—Entered and filed June 20th,* 1878.
April term, 1878.

NEW ORLEANS, *Thursday, June 20th,* 1878.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX ET AL. } No. 3663.

On motion of J. D. Rouse, solicitor for the defendant, Mrs. Eliza Davis, widow of Minor Kenner, deceased, administratrix of the estate of Minor Kenner and tutrix of her minor children, it is ordered that said defendant be and is hereby allowed an appeal from the final decree rendered in this cause against her the tenth day of June, 1878, to the Supreme Court of the United States, returnable at the next term thereof, on the first day of said term, upon the said defendant giving bond for costs with good and sufficient surety in the sum of five hundred dollars; or if, in lieu of such bond for costs, the said defendant shall give bond with solvent surety within the time and conditioned as prescribed by law in a sum equal to the probable net revenues of the property
229 claimed for two years, which shall be ascertained by the master, J. Ward Gurley, jr., said appeal shall operate as a supersedeas; and it is further ordered that this motion and order be entered of record in this cause.

Report of J. Ward Gurley, jr., master, &c., on estimate of probable net revenues of property for two years, &c.—Filed July 17th, 1878.

Circuit court of the United States for the 5th circuit and district of Louisiana.

MYRA C. GAINES
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P. H. MONSSEAUX ET AL. } No. 3663.

Report of sp'l master.

To the honorable the judges of said court:

Under and by virtue of the order entered herein on the 20th June, 1878, as per attached certified copy, the testimony of Jacob Kirsch, C. D. Leconte, and Charles Hodges, which is herewith returned into court, was taken before the undersigned sp'l master to ascertain the probable net revenues of the property claimed by Mrs. Myra C. Gaines from Mrs. Eliza Davis, widow of Minor Kenner and tutrix of her minor children, for two years.

The two first named witnesses, Jacob Kirsch and C. D. Leconte, were produced on behalf of said defendant, and the last named wit-
230 ness, Charles Hodges, was produced by complainant, as will appear, together with all other and necessary particulars, from the minutes of proceedings had before the master and attached to said testimony.

Defendant's witnesses both estimate the "probable net revenues of the property claimed" for the next few years at five hundred dollars ($500) per annum.

Complainant's witness estimates the revenues at about fifteen hundred dollars ($1,500) per annum, but afterwards says that he does not know whether he could get tenants to occupy the place without furnishing implements.

Upon this evidence the master concludes that "the probable net revenues of the property claimed for two years" will not exceed the sum of fifteen hundred dollars ($1,500), and he reports this sum as being, in his opinion, a fair estimate of the net revenues in question for a period of the next two years.

Very respectfully submitted.

(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

N. O., LA., *July 16th,* 1878.

Testimony on behalf of Mrs. Eliza Kenner, widow, &c.—Filed with report July 17th, 1878.

231 In the circuit court of the United States for the 5th circuit and district of Louisiana.

MYRA C. GAINES
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P. H. MONSSEAUX ET AL. } No. 3663.

At New Orleans, La., July 12th, 1878, before Sp'l Master J. Ward Gurley, jr., at his office, 47 Camp st., by virtue of order of court entered

herein June 20th, '78, and pursuant to annexed notice, appeared J. D. Rouse, esq., solicitor for defendant Mrs. Eliza Davis, widow of Minor Kenner and tutrix of her minor children.

DISTRICT OF LOUISIANA, *ss:*

Personally appeared Jacob Kirsch and C. D. Leconte, of Kenner, parish of Jefferson, State of Louisiana, witnesses on behalf of said defendant, who being each first duly sworn to tell the truth, the whole truth, and nothing but the truth in answer to each and every question and cross-question which might be propounded to them and each of them, relative to the matters and things under examination did depose, and upon their oaths says as follows upon the next four pages.

Attest:

(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

JACOB KIRSCH sworn, says:

To Mr. ROUSE:

232 I live in Kenner, Jefferson Parish, and have lived there about 15 years. I am familiar with the property of Mrs. Eliza Kenner at that place. It was formerly two plantations, under the names of "Bell Grove" and "Pasteur." I have heard lately that one of those plantations is claimed by Mrs. Gaines—Bell Grove they say is claimed by her. It has been overflowed on the back part for the three years last past. It has been overflowed by Bonnet Carre crevasse, and it is still overflowed. There are a few negro quarters upon the place, but no residence and no barn. After paying all taxes and costs the place would net probably five hundred dollars per annum in its present condition.

(Signed) JACOB KIRSCH.

Sworn to and subscribed before me, July 12th, '78.

(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

C. D. LECONTE sworn, says:

To Mr. ROUSE:

I live in Kenner, Jefferson Parish, and have lived there seven and a half years. I am acquainted with the property there belonging to Mrs. Kenner. I know that a portion of it, which is called "Bell Grove,"
233 is now claimed by Mrs. Gaines. There are some old negro quarters upon the place, and they are almost rotten. Bell Grove has been overflowed for the last three or four years by Bonnet Carre crevasse, and it is still overflowed. The overflow has filled up the ditches and seriously injured the place, excepting a few acres near the river. I think about five hundred dollars per annum rent might be obtained over and above taxes for that place for the next few years. I think there has been a few small shanties put up on the place within the last few years, but they are of little or no value. I have been a planter myself and therefore know the rental value of places. Bell Grove is within the corporate limits of the city of Kenner, although outside of the improved portion, and it is therefore subject to a city tax as well as to a parish and State tax.

* * * * * * *

By sp'l master, in the absence of Mr. Mill:

Witness says:

The Oakland plantation, which lies just above Bell Grove, there be-

ing a strip of five arpents between the two, rents for six hundred
234 dollars per annum. So the man who rents it told me.

The difference between the Oakland and Bell Grove, I cannot exactly tell, but Oakland is 16 acres front on the river, running back into the swamp, I don't know how far. There is a residence on Oakland plantation, and there is an old sugar-house on the place and quarters.

There is more land fit for cultivation on Oakland than on Bell Grove, notwithstanding the overflow.

(Signed) C. D. LECONTE.

Sworn to & subscribed before me, July 12th, 1878.

(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

Adjourned.

J. W. G., JR.

Notice annexed to report.

NEW ORLEANS, *July 11th*, 1878.

WM. REED MILLS, Esq.,
Att'y at Law, City:

MY DEAR SIR: In the matter of Gaines vs. Kenner, No. 3663, U. S. cir. c't, Mr. Rouse has assigned 11 a. m., July 12th, for the purpose of taking testimony before me on the matter referred.

You are requested to be present.

Very truly,
(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

235 Served a true copy of the above notice upon Wm. Reed Mills, esq., in person, on the 11th July, 1878.

(Signed) W. M. GURLEY.

Sworn to and subscribed before me.

(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

Testimony on behalf of Mrs. Gaines.—Filed with report July 17th, 1878.

In the circuit court of the United States for the 5th circuit & district of Louisiana.

MYRA C. GAINES
vs.
P. H. MONSSEAUX ET AL. } No. 3663.

At New Orleans, La., July 15th, 1878, before Sp'l Master J. Ward Gurley, jr., at his office, 47 Camp str., by virtue of order of court entered herein June 20th, '78, and pursuant to agreement of solicitors, appeared Wm. Reed Mills, esq., solicitor for Mrs. Myra C. Gaines; appeared J. D. Rouse, esq., solicitor for defendant, Mrs. Eliza Davis, widow of Minor Kenner, and tutrix of her minor children.

DISTRICT OF LOUISIANA, *ss:*

236 Personally appeared Charles Hodges, of Kenner, Jefferson Parish, State of La., a witness on behalf of complainant, who being

first duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the matters and things under examination, and in answer to the questions and cross questions which might be propounded to him, did depose, and upon his oath says as follows upon the next six pages.

Attest:

(Signed) J. WARD GURLEY, JR.,
Sp'l Master.

CHARLES HODGES, sworn, says:

To Mr. MILLS:

I reside in Kenner, and have lived there about 8 or 9 years.

Q. What, if any, possession, and how long have you had, of what is known as the "Bell Grove" plantation, lately claimed from widow Minor Kenner by Myra C. Gaines?

Ans. I have had possession of the major part of it since the time I went to live at Kenner, and I have had possession of the minor portion of it during the same time, but a portion of the place I have never had possession of at all.

Q. Was your possession with the consent of Mrs. Kenner?

Ans. So far as I have occupied it, yes.

Q. Under what title, either as lessee or otherwise was that possession?

237 Ans. My possession was first as lessee, subsequently as co-owner; this, however, referring only to the property actually delivered to me and which I have since occupied.

Q. Do you know the frontage on the river in acres or arpents of the "Bell Grove" plantation?

Ans. I do not.

Q. Have you seen a plan of what is known as the "Bell Grove" plantation?

Ans. Yes; I have a plan.

Q. Do you remember the number of arpents front of this plan?

Ans. I do not.

Q. Have you a copy of it in your possession?

Answer. Yes.

Q. Will you be kind enough to produce it to Mr. Gurley?

Answer. Yes, sir.

Q. From whom did you get that plan, or whose plan is it?

Ans. I received that plan from Mrs. Kenner.

Q. What, were you the owner of that plantation known as "Bell Grove," would you be willing that a third party should keep possession of it by the year?

Ans. Two thousand dollars by the year. That is, if the privilege of getting out timber is included. The overflow affords advantages for getting out timber, and if the privilege of getting out timber is
238 included my estimate is about right, but if that privilege is not included then my estimate is much too high.

Q. Without the privilege of getting out timber, and subject to overflow as the place now is, what is your estimate by the year?

Ans. That is a very difficult question to answer, but I should estimate it is about fifteen hundred dollars per year. I only occupy a portion of the place and cannot say what the rest is worth—my portion is not worth $1,500.

* * * * * * *

To Mr. ROUSE:

I cannot say whether my portion is worth $500 per year without implements, &c. I don't know whether I could get tenants to occupy the place without furnishing implements.

Q. When you speak of the portion occupied by you do you not include all of "Bell Grove" that was owned by Mrs. Kenner since 1865?

Ans. I don't know what was owned by Mrs. Kenner; what I received from her was the number of arpents and squares marked on the map before alluded to and now in my possession.

Q. Do you not know that several pieces of land within the limits of "Bell Grove" were sold by Minor Kenner during his life-time?

Ans. I do not.

239 Q. Don't you know that several pieces of that tract of land was sold to W. P. Coleman by Minor Kenner in his life-time?

Ans. I don't know it.

Q. Has it not been your understanding and belief since you have been living there that several large tracts of that land was sold before the death of Minor Kenner?

(Mr. Mills objects on the ground of mere opinion of a witness effecting title of real estate.)

Ans. I certainly thought so, but I have no knowledge of the facts.

Q. When you say that you have in your possession a plan of "Bell Grove" plantation, do you not mean a lithographic plan of the town of Kenner?

Ans. Yes; but in my previous answer I expressly reserved that I did not know what the limits of "Bell Grove" were, and more than that I referred specially to the portions of "Bell Grove" plantation which I received from Mr. Kenner.

Q. Does that place embrace any other land besides "Bell Grove" plantation?

Ans. I think so, but I think also that it does not embrace what is known as the whole of "Bell Grove" plantation.

Q. Is there anything on the plan to mark the boundaries of "Bell Grove" plantation?

Ans. Yes, the map of the surveyor shows the upper line as be-
240 ing the boundary of "Bell Grove," but the map is a map of the town, and does not show the boundaries of "Bell Grove," because it does not go back to the lake, but merely to the edge of the swamp where the cleared lands are, and I am not a surveyor and I have never surveyed the lands—it is impossible for me to know the boundaries.

(Signed) C. HODGES.

Sworn to & subscribed before me, July 15th, 1878.

(Signed)

J. WARD GURLEY, JR.,
Sp'l Master.

Adjourned.

J. W. G., JR.,
Special Master.

Entry in the order book of filing of report.—July 17th, 1878.

MYRA C. GAINES *vs.* P. H. MONSSEAUX ET AL., AS TO MRS. ELIZA Davis, widow Kenner.	No. 3663.

The parties in interest are hereby notified that J. Ward Gurley, jr.

special master, has this day filed this report upon "the probable net revenues of the property claimed for two years," &c.

Bond for appeal.—Filed July 26th, 1878.

241 UNITED STATES OF AMERICA:

Know all men by these presents that we, Mrs. Eliza Davis, widow of Minor Kenner, administratix of the succession of said Minor Kenner, and tutrix of her minor children, as principal, and Duncan F. Kenner as surety, are held and firmly bound, jointly and severally, unto Myra Clark Gaines in the sum of fifteen hundred dollars, lawful money of the United States of America, to be paid to the said Myra Clark Gaines, her heirs, executors, administrators, and assigns; for which payment well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated the seventeenth day of July, in the year of our Lord eighteen hundred seventy-eight.

Whereas said Mrs. Eliza Davis, widow, etc., administratrix of the succ'n of Minor Kenner and tutrix as above, hath taken an appeal to the Supreme Court of the United States, from the final decree of the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, rendered in favor of said Myra Clark Gaines and against said Mrs. Kenner on the 10th day of June, 1878, in the suit entitled Myra Clark Gaines vs. P.
242 H. Monsseaux et al., No. 3663 of the docket of said court:

Now the condition of the above obligation is, that if the above bounden Mrs. Eliza Davis, widow & administratrix and tutrix as aforesaid, shall prosecute her said appeal to effect and answer all damages and costs if she fail to make her plea good, this obligation shall be void, otherwise to remain in full force and virtue.

(Signed)

MRS. ELIZA KENNER,
Widow, etc.
Pr. pro J. D. ROUSE, [L. S.]
(Signed) D. F. KENNER. [L. S.]

STATE OF LOUISIANA,
Parish of Orleans:

This day personally appeared before me the undersigned authority, and being duly sworn did depose and say that he is worth the sum of ten thousand dollars over and above all debts and excluding property exempt from execution, and has unencumbered real estate situate in the city of New Orleans, of that value.

(Signed)

DUNCAN F. KENNER.

Sworn to and subscribed before me this 17th day of July, A. D. 1878.
[SEAL.] (Signed) N. B. TRIST, *Not. Pub.*

I approve the above bond.
July 20th, 1878.
(Signed) EDWARD C. BILLINGS, *Judge.*

243 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 135 pages, from page 1 to page 135 inclusive, printed matter, and 107 pages, from page 136 to page 242 inclusive, manuscript, contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Myra Clark Gaines vs. P. H. Monsseaux, Mrs. Eliza Kenner, et al., No. 3663 of the docket of said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21 day of September, A. D. 1878.

(20) twenty words interlined approved; 12 words erased approved before signing.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 21 day of September, A. D. 1878.

EDWARD C. BILLINGS, *Judge.*

244 THE UNITED STATES OF AMERICA,

Circuit court of the United States, district of Louisiana.

The President of the United States to Myra Clark Gaines, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and an order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, in the suit wherein you are the complainant and appellee and Mrs. Eliza Davis, widow of Minor Kenner, deceased, administratrix of the estate of Minor Kenner and tutrix of her minor children, one of the defendants, is appellant, to show cause, if any there be, why the decree rendered against the said Mrs. Eliza Davis, widow, administratrix and tutrix aforesaid, as in said motion and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

EDWARD C. BILLINGS, *Judge.*

245 (Indorsed:) United States circuit court. No. 3663. Myra Clark Gaines vs. P. H. Monsseaux et al. Citation.

Marshal's return.

Received Jul' 20, 1878, by the U. S. marshal, and on the 22nd day of July, 1878, served a true copy of the within citation on Myra Clark Gaines, within named, through her solicitor, Wm. Reed Mills, esq., by handing the same to him, the said Wm. Reed Mills, in person, in the city of New Orleans.

W. G. ELLIOTT,
D'y Marshal.

On this 31 day of July, 1878, personally appeared before me, William G. Elliott, a deputy U. S. marshal for the district of Louisiana, and makes oath that he served a copy of the within citation on Myra Clark Gaines, through her solicitor, Wm. Reed Mills, esq., as stated in his official return hereon.

W. G. ELLIOTT.

Sworn to and subscribed before me this 31 day of July, 1878.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 498. Eliza Davis, widow of Minor Kenner, dec'd, & adm'x of the estate of M. Kenner, & tutrix of her minor children, appellant, vs. Myra Clark Gaines. Louisiana C. C. U. S. Filed 1st October, 1878.

ADDITION TO RECORD No. 218.

Stipulation of counsel and addition to record.—Filed January 4, 1881.

Supreme Court of the United States.

ELIZA DAVIS, WIDOW, &C., APPELLANT,
vs.
MYRA CLARK GAINES. } No. 218.

1 United States circuit court, district of Louisiana.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX ET ALS., MRS. ELIZA DAVIS, Widow Kenner, appellant. } No. 3663.

Transcript of "omitted evidence," as per agreement of parties.

2 Supreme Court of the United States. Oct. term, 1880.

ELIZA DAVIS, WIDOW OF MINOR KENNER, adm'r'x, etc., appellant,
vs.
MYRA CLARK GAINES, APPELLEE. } No. 218.

On appeal from the circuit court of the United States for the district of Louisiana.

Agreement referred to in certificate.—Dec. 31, 1880.—*F. A. Woolfley, clerk.*

Whereas there was omitted from the transcript of appeal in the above entitled and numbered cause, herein filed on the 1st day of October, 1878, certain portions of the evidence offered by said Myra Clark Gaines, complainant, and consisting of the following, to wit:

1°. Order on petition of Francis D. de La Croix, and the affidavit of notaries.

2°. Proces verbal of inventory (translation) of Tho's Beale, register of wills, of August 19th, 20th, 23rd, and 27th, 1813.

3°. Petition of Richard Relf, executor, of August 27th, 1813, for permission to mortgage and pledge property and assets of the succession of Daniel Clark, and order thereon.

3 4°. Sale, by register of wills, of movables, &c., Oct. 10th and 11th, 1813.

5°. Sale, by register of wills, of slaves, Oct. 4, 1813.

6°. Petition for reappraisement of slaves, Oct. 4th, 1813, and order thereon.

7°. Reappraisement of slaves of Oct. 5th, 1813.

8°. Reoffer and sale of slaves on Oct. 5th, 1813.

9°. Reoffer and withdrawal of sale of slaves on 27th of January, 1814.

And whereas the clerk of said circuit court of the United States for the district of Louisiana. has prepared a duly certified transcript of such omitted evidence, which is contained in pages, and is hereto attached:

It is therefore agreed that the said transcript of said omitted portions of evidence, hereto attached, shall constitute and form part of the original transcript of appeal herein.

I. D. ROUSE,
Soli. for Appellant.
WM. REED MILLS,
Sol'r for Appellee.

4 *Affidavit attached to petition filed by F. D. de La Croix on Aug. 18, 1813, and printed in transcript herein at p.* 124.

Francis Dusan de La Croix, the above petitioner, maketh oath that the material facts in the above petition set forth are true, to the best of his knowledge and belief.

(Signed) DUSAN DE LA CROIX.

Sworn to before me, August 18th, 1813.

(Signed) THOS. BEALE,
R. Wills.

Order on said petition.

It is ordered that the several notaries of this city do appear before this court, at the office of the register of wills, to-morrow, the 19th instant, at 9 o'clock a. m. precisely, in order to comply with the prayer of this petition.

New Orleans, August 18th, 1813.

(Signed) J'S PITOT, *Judge.*

[1] *Transcript of omitted evidence.—F. A. Woolfley, clerk.*

Petition of R. Relf.—Filed August 27th, 1813.

To the honorable James Pitot, judge of the court of probates in and for the parish and city of New Orleans.

The petition of Richard Relf, testamentary executor of the late 5 [1⅛] Daniel Clark, humbly showeth that your petitioner has been duly empowered by the late Daniel Clark to settle all his affairs that by the situation in which he finds the estate, it thought it impossible to discharge the debts of the said estate without the assistance of the bank or of friends who will be disposed to advance money for that purpose or without sacrificing the property of the deceased and the interest of the creditors as well as that of the heirs.

Wherefore your petitioners prays your honor to grant him the necessary authorization, with the consent of the counsel for the absent heirs, to mortgage or give in pledge all such of the properties and effects of the estate, he will think proper to obtain money to discharge the debts of the said estate, and even to bind himself as executor to obtain the renewal of such notes drawn or indorsed by the late Daniel Clarke that he will necessary or convenient to renew in order to avoid the sacrificies of the estate by an immediate sale for cash, or at terms of credit so that it would be impossible to obtain a price proportionate

to the value of the property.

And your petitioner, as in duty bound, will ever pray, &c.

(Signed) RICHARD RELF.

I consent that the prayer of the petitioner be granted as a proper one and the best calculated for the interest of the heirs of the deceased.

6 [1¼] New Orleans, August 27th, 1813.

(Signed) MOREAU LISLET,
Of Counsel for Absent Heirs.

Order.

Let the prayer of this petition be granted, with the consent of the counsel for the absent heirs.

New Orleans, August 27th, 1813.

(Signed) J'S PITOT, *Judge.*

Petition for new appraisement.—Oct. 4, 1813.

To the honorable James Pitot, judge of the court of probates for the parish of New Orleans:

The petition of Richard Relf, one of the testamentary executors of the late Daniel Clark, humbly showeth that the appraisement on the 5th of October last of several slaves of the estate of Daniel Clark they have been estimated so high that when they have been offered for sale on this day at public auction it was impossible to obtain the price of their appraisement.

And whereas there are now many respectable planters and other persons collected to become bidders to that sale, who may be absent on another day if the auction is postponed, whereof the estate may be greatly injured:

7 [1½] Your petitioner prays your to order that a new appraisement be made immediately by three respectable planters, or other persons having, as far as possible, a knowledge of the character of the said slaves.

And your petitioner, as in duty bound, will ever pray, &c.

(Signed) RICHARD RELF.

I do consent to a new and immediate appraisement of the slaves who have been offered for sale, and whose price of appraisement has not been obtained.

MOREAU LISLET,
Attorney for the Absent Heirs.

Order.

Let a new appraisement be made as prayed for.

New Orleans, October 4th, 1813.

(Signed) J'S PITOT, *Judge.*

8 [1¾] To-day, the 18th of August, in the year of our Lord one thousand eight hundred and thirteen and of the independence of the United States the thirty-eighth, at four o'clock, at the requisition of Richard Relf, and in obedience to the order of the honorable judge of the probate court of this date, directing an inventory of the estate of the

late Daniel Clark, according to law, we, Thomas Beale, register of wills for the city and parish of New Orleans, went on the Bayou road to the house in which the late Daniel Clark died, in order to in spect and lift the seals placed by Gallien Preval, one of the justices for the said city and county, upon the possessions of the said deceased. Being there, we met Mr. Richard Relf, the testamentary executor of the deceased, M. Moreau L'Islet, advocate appointed by the court to represent the absent heiress, and Mr. Gallien Preval, justice of the peace, and in their presence, and in that of Messrs. Prospere Prieur and Sebastian Blondeau, witnesses, we required Francisco Morales, guardian of said sealed effects, to exhibit the same, which he did, as follows: First. A wardrobe of wood, the seals being recognized as intact. The said guardian being discharged, the wardrobe was opened; we found nothing but papers, which were examined carefully, to get at such notes as had but a short time to run. We found first a note on demand for $4,461, drawn in favor of deceased by John Lynd, dated 10th April, 1813, payable four months after date; this we classed, marked and put in the inventory under letter A, No. 1 ..... $4,461

Item. Another note for $400, dated 7th July, 1813, payable sixty days after date, drawn in favor of deceased by G. Debuys; this note was classed and lettered B, No. 2 400

4,861

Which notes we placed in the hands of Mr. Relf, testamentary executor, who took charge of them, and all the papers of the said wardrobe having been carefully examined, as also those of a mahogany wardrobe standing in the same room, and not finding any will or other notes of short dates, we tied up all the papers which we placed in the said bureau, upon which we placed the seal No. 1, and intrusted the keys of the bureaus to the care of Mr. Francisco Morales, who promised, on oath, to return them when and as often as he shall be legally required.

And all the parties have signed with us, the same day, month, and
9 [2] year as above; and we withdrew, appointing the continuation of the present inventory at ten o'clock to-morrow, of which all parties and the witnesses were duly informed.

(Signed) RICHARD RELF,
THOS. BEALE.
Register of Wills.
GALLIEN PREVAL,
Justice of the Peace.
E. MOREAU L'ISLET,
Representative of the Absent Heirs.
BLONDEAU,
PROSPER PRIEUR.

And to-day, the 19th August, in the year of our Lord, one thousand eight hundred and thirteen, and the thirty-eighth of the independence of the United States of America, at six o'clock in the morning, the hour agreed upon, we, Thomas Beale, register of wills for the city and parish of New Orleans, repaired to the dwelling on the bayou road, where the late Daniel Clark died, in order to draw up an inventory of and to value the furniture, effects, jewels, plate, lands, slaves, titles, and papers belonging to said estate; being here, we met with Messrs. Richard Relf, testamentary executor of the deceased, and Louis Moreau L'Islet, the lawyer appointed by the court, to represent the absent heiress. The Messrs. Prospere Prieur and Sebastien Blondeau, being duly sworn in

their presence to the faithful performance of their duties as appraisers of the property belonging to the inheritance, we proceeded as follows:

First, in a lower room, the following objects we found:

A high post bed-tead, of cherry, with three mattresses of Spanish moss, and ticking; a bolster, two pillows, and an old muslin musquito bar, with its trimmings, valued by the aforesaid appraisers at	$35 00
Item. A small walnut bureau in the form of a bookcase	20 00
Item. A small cherry table	3 00
Item. Small folding cherry table	4 00
Item. Wardrobe, yellow wood	30 00
Item. 12 chairs, wood, painted green	12 00
Item. Pair of horse pistols, with holsters	12 00
Item. Dagger, mounted in silver	3 00
Item. Sabre, brass mounted	12 00
Item. Two pairs of razors, with small toilette glass	2 00
In the upper room—	
A set of china, composed of 12 cups, 11 saucers, a teapot, a cream pot, a sugar dish, and 3 plates, together with a waiter, painted red	30 00
Item. Another set of porcelain, consisting of 12 cups, 12 saucers, a coffee-pot, a bowl, and three plates, with a waiter, painted black	20 00
Item. Wash-bowls and pitcher	10 00
Item. Two old card tables	4 00
10 [3] Item. A folding table, cherry	8 00
Item. 1 case of mathematical instruments, and a small powder flask	4 00
Item. A library, composed of 703 vols., on various subjects, some of which are liable to be reclaimed by their owner	700 00
Item. 18 spoons, 12 forks, 2 soup ladle, 16 tea-spoons, 24 cream spoons, and a sugar tongs, the whole of silver, and weighing 128 ounces 6 grains	128 00
Item. An English gold watch, double case	26 00
Item. 10 pieces heavy blue "satine," $25 per piece	250 00
Item. Broken dinner set, blue china	50 00
6 doz. red wine, at $6 per doz	36 00
10 doz. white wine, at $8 per doz	80 00
	1,489 75

The above is a complete list of the furniture and effects belonging to the estate. We then proceeded to the valuation of the slaves of the estate:

Name, occupation, age, and valuation.

Will, field-hand, 31 years	$500 00
Lubin, house servant, 35 years	600 00
Coks, foreman, mulatto, 45 years	550 00
Solomon, field-hand, negro, 45 years	500 00
Jacob, field-hand, sick, 17 years	300 00
Jack Lugen, field-hand, negro, 18 years	550 00
Anthony, field-hand, negro, 40 years	500 00
David, field-hand, negro, 50 years	450 00
Paul, field-hand, negro, 22 years	450 00

	George, field-hand, negro, 50 years	200 00
	Adam, field-hand, negro, 50 years	300 00
	Doctor David, physician, negro, 35 years	500 00
	Randolph, field-hand, negro, 35 years	450 00
	Etienne, field-hand, negro, 50 years	400 00
	Lubin, field-hand, negro, 40 years	400 00
	Ref, field-hand, negro, 45 years	400 00
	Providence, field-hand, negro, 45 years	400 00
	Figara, field-hand, negro, 30 years	300 00
	Luidor, field-hand, negro, 30 years	550 00
	Nerife, field-hand, negro, 30 years	500 00
	Nese, field-hand, negro, 30 years	500 00
	J. Sam, field-hand, mulatto, 18 years	500 00
	Jean, field-hand, negro, 20 years	500 00
	Solomon, field-hand, negro, 45 years	450 00
	Austin, field-hand, negro, 25 years	500 00
	James, field-hand, negro, 16 years	500 00
	Gibaud, field-hand, negro, 45 years	400 00
	Wallis, field-hand, negro, 30 years	500 00
11 [4]	Charles, field-hand, mulatto, 45 years	$500 00
	Jacques, field-hand, mulatto, 35 years	500 00
	Codio, field-hand, mulatto, years	500 00
	Davis, whip sawyer, 60 years	300 00
	Cardinal, negro, 25 years	450 00
	Jeremiah, field-hand, negro, 35 years	500 00
	Ebony, field hand, negro, 40 years	400 00
	John, field-hand, negro, 40 years	400 00
	Merode, field hand, negro, 35 years	450 00
	Willis, field-hand, negro, 18 years	550 00
	Moses, field-hand, negro, 16 years	500 00
	Davis, field-hand, negro, 20 years	450 00
	Andrew, field-hand, negro, 20 years	500 00
	Dress, field-hand, negro, 45 years	400 00
	Andrew, field-hand, negro, 55 years	250 00
	Thorn, field-hand, negro, 45 years	450 00
	Robe, field-hand, negro, 28 years	550 00
	Alder, field-hand, negro, 35 years	400 00
	James, field-hand, negro, 60 years	150 00
	Harry, house-servant, mulatto, 15 years	500 00
	Stonder, stock-minder, mulatto, 45 years	400 00
	Arthur, negro boy, 12 years	300 00
	Sam, negro man, house, 48 years	300 00
	Ledger, boy, negro, 11 years	300 00
	Phoebe, field-hand, woman, 60 years	200 00
	Fanny, field-hand, woman, 60 years	200 00
	Anna, negro woman, 22 years	300 00
	Genevieve, negress, creole, Natchez, 45 years	400 00
	Betty, 25 years, with two children, John, 5 years, and Julia, an infant	600 00
	Liza, mulatto, aged 20, with her infant, William, 14 months old	500 00
		26,600 00

These constitute all the slaves presented to us as belonging to the estate of the said deceased, Daniel Clark.

After which, we, the aforesaid and undersigned register, proceeded to the description and valuation of the house, as follows:

HOUSES AND LANDS.

A storied house, fronting seventy feet on Bretonne Place, and running back fifty feet, containing a large room and three chambers (with two fire-places), and a gallery, on the ground floor; a large room, three apartments (two with fire-places), in the second story; and a gallery and garret, divided into several small chambers. The said house is built of brick and covered with shingles.

Besides, a building containing kitchen and lodging rooms for servants, seventy feet long, built of colombage and covered with 12 [5] shingles, valued, with the ground upon which it stands, agreeably to the plan of B. J. Lafau, and designated as No. 5 (being too well known to require further description), at $10,000.

Mr. Richard Relf, the testamentary executor, out of respect to the deceased, requested that the inventory of the wardrobe and body linen be not proceeded with; which request was acceded to by C. Moreau L'Islet, the legal representative of the heiress.

At three o'clock, after securing the papers in three trunks, under seal, all parties consenting in the usual form, the examination was postponed to the following day at four o'clock.

After reading the foregoing proceedings, we found that the estimated value of the furniture, as far as examined, amounts to one thousand four hundred and eighty-nine dollars and seventy-five cents. The value of the slaves amounts to twenty-six thousand nine hundred dollars, and that of the house above described, to ten thousand dollars. The which furniture, effects, slaves, and houses we have left to the disposal of Mr. Richard Relf, testamentary executor, who charged himself with them, and who joined with us and other parties and witnesses, in signing the foregoing, on the same day, month, and year as above. We then withdrew.

(Signed)

MOREAU L'ISLET,
Representative of Absent Heirs.
RICHARD RELF.
THOMAS BEALE, *Register.*
BLONDEAU.
PROSPERE PRIEUR.
RICHARD REED.

And to-day, the 20th of the month of August, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the United States of America the thirty-eighth, at four o'clock, we, Thomas Beale, register of wills for the city and parish of New Orleans, proceed, in our office, in the presence of the parties and witnesses assembled, to the selection and classification of the papers contained in a small trunk, upon which was placed the seal, No. , in the following manner:

First. A note to order, for the sum of five hundred dollars, accepted in favor of deceased, by Morin, acting under a power of attorney from his wife, duly witnessed, &c., by Broutin, notary public, dated 3d July, 1813, and payable during all December next; the said note was marked and inventoried by us under the Letter C, No. 3..... $500 00

Item. Another note to order of the sum of two hundred and eighty-four dollars and fifty cents accepted in favor of the deceased by P. D. Toley, dated 6th September, 1810, and payable on demand; by us classed, marked, and accounted for under Letter D, No. 4. On the back of said note is a credit in the handwriting of the deceased for one hundred dollars, which reduces the value of said note to one hundred and eighty-four dollars and fifty cents..... 184 50

13 [6] Item. A bond for one hundred dollars, drawn in favor of the deceased by L. Boisdore, dated 14th of April, 1810, payable on demand; classed, marked, &c., under letter E, No. 5..... $100 00

Item. A note for ten dollars, payable on demand, drawn in favor of deceased by A. J. Lancell, dated 29th of August, 1811; marked, classed, &c., under the letter F, No. 6..... 10 00

Item. A note for one thousand dollars, payable at will, drawn in favor of deceased by Gilberto Leonard, dated 13th of March, 1797; classed, marked, &c., under the letter G, No. 7..... 1,000 00

Item. A note for one hundred dollars, dated 23d of February, 1813, payable at will, accepted in favor of deceased by Abraham Arcenans; classed, &c., under letter H, No. 8.. 100 00

Item. A note for one hundred dollars, dated 4th of September, 1811, drawn in favor of deceased by Mr. Perez; classed, &c., under letter I, No. 9..... 100 00

1,994 50

Amount brought forward, $1,994 50

Item. A bond for three hundred dollars, accepted in favor of deceased by Magnay, dated 23d of March, 1810; classed, &c., under letter J, No. 10..... 300 00

Item. A note to order for three thousand dollars, dated 20th May, 1811, payable 1st May, 1812, accepted in favor of deceased by Elizabeth R. Trepagnier; classed, &c., under the letter K, No. 11..... 300 00

Item. An acknowledgment in favor of the deceased by Colsson, for fifty-four dollars and twenty-five cents, dated 17th October, 1806; classed, &c., under the letter L, No. 12 ... 54 25

Item. A note for fifty five dollars, dated 23d November, 1811, payable one year from date, drawn in favor of deceased by Richard Devals; classed, &c., under letter M, No. 13..... 55 00

Item. A note for seven thousand three hundred and thirty-three dollars and ninety cents, drawn in favor of John Clay by James Sterrot, dated 3d October, 1808, payable six months from date; which note is indorsed by John Clay and the deceased, beneath which is a receipt to deceased for the amount of the note, signed by P. Grymes; classed, &c., under letter N, No. 14..... 7,333 90

Item. An order drawn by Chevalier de Bellogent on M. Barriere in favor of deceased for one hundred and sixty-two dollars; classed, &c., under letter O, No. 15..... 162 00

Item. A note for six thousand five hundred and fifty-seven dollars and ninety-two cents, drawn in favor of William

14 [7] Brooks by Ferdinand L. Claiborne, dated 18th November, 1811, payable 1st February, 1813, the said note

endorsed by William Brooks, Ferdinand H. A. Claiborne, and Chew & Relf; classed under letter P, No. 16..... $6,557 92

Item. A note dated 15th July, 1799, for forty-two dollars, accepted in favor of deceased by John Raffray; classed under the letter Q, No. 17..... 42 00

Item. A bond drawn in favor of deceased, dated 8th June, 1813, payable 8th June, , drawn by William Harper, for thirty-one thousand dollars; classed, &c., under letter R, No. 18..... 31,000 00

Item. A note for two thousand dollars, drawn to order of deceased by William Harper, dated 1st May, 1813, payable 1st May, 1820; classed, &c., under letter S, No. 19..... 2,000 00

Item. Three notes of same date for two thousand dollars each, amounting in all to six thousand dollars, payable on the 1st, 18th, and 19th May, 1817, drawn by William Harper in favor of deceased; classed, &c., under letters U, V, W, and Nos. 21, 22, and 23..... 6,000 00

Item. Two notes for three thousand one hundred and twenty-five dollars each, amounting together to six thousand two hundred and fifty dollars, signed in favor of deceased by Henry Hunt, dated 15th May, 1810, payable in one and two years after date; classed under letter XX, and Nos. 24 and 25..... 6,250 00

Item. A note dated 15th May, 1810, bearing interest from date, drawn in favor of deceased for three hundred dollars by William Hunt; classed, &c., under Z, No. 26..... 300 00

Item. A due bill for 903, drawn in favor of deceased by John Watkins, dated 24th August, 1807; classed, &c., under double letter AA, No. 27..... 300 00

Item. Due bill for five thousand four hundred and ninety-five dollars and seventy-five cents, drawn in favor of deceased, by Edward D. Turner, and dated 19th December, 1808; classed, &c., under double letter BB, No. 28..... 5,495 00

70,145 32

Amount brought forward, $70,145 32

Item. A mortgage bond for nine thousand six hundred and nineteen dollars, given in favor of deceased by John Watkins, dated 29th August, 1805, acknowledged before Peter Pedesclaux, notary public, and inserted here also a memorandum; classed, &c., under double letter CC, No. 29 9,619 50

15 [8] Item. Bank book, by which it appears that there is a balance due the estate by the Bank of Louisiana of eighty-three dollars and ninety-eight cents; classed, &c., under double letter DD, No. 30..... $83 98

Item. Bank book showing balance due by the Citizens' Bank for four thousand one hundred and eight dollars and forty-three cents, classed under double letter EE, No. 31..... 4,108 43

Item. Bank book showing balance due the estate by Bank of Orleans, to be three thousand and thirty-seven dollars and seventy-three cents; classed, &c., under double letter FF, No. 32..... 3,037 73

86,994 96

It being now seven o'clock, proceedings were here suspended, to be

resumed (by consent of parties) on Monday, 23d instant. On reading the foregoing we find the amount of accounts to be eighty-six thousand nine hundred and ninety-four dollars and ninety-six cents.

Signed by all the parties and witnesses on the same day, month, and year as above mentioned.

(Signed) MOREAU L'ISLET,
Representing the Absent Heirs.
RICHARD RELF.
THOMAS BEALE,
Register.
FLONDEAU.
PROSPERE PRIEUR.

And to-day, the twenty-third of August, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-eighth of the Independence of the United States of America, at six a. m., we, the aforesaid Thomas Beale, register of wills, proceeded in our office in the presence of all the parties and witnesses assembled, for the selection, classification, and making an inventory of the papers belonging to the estate of the said deceased Daniel Clark in the following manner, after having, in the presence of the said parties and witnesses, lifted the seals, which were recognized as intact, from the small trunk containing the papers:

First. A bundle containing twenty-eight notes drawn in favor of the deceased, by persons supposed to be insolvent, amounting together to eight thousand four hundred and fifty-three dollars and eighty-nine cents and a half, which were classed, marked, and entered here merely by way of memorandum. The said bundle was put in the inventory under the double letter GG, No. 33.

Item. A bundle containing thirty-four documents, relating to Florida lands, which were regularly marked and classed, and the bundle was put in the inventory under the double letter HH, No. 34.

16 [9] Item. A bundle containing eighteen agreements, classed and arranged. The said bundle was put in the inventory under the double letter II, No. 35.

Item. Another bundle containing seven mortgages in favor of the estate which we regularly classed and arranged. The bundle was put in the inventory under the double letter JJ, No. 36.

Item. Another bundle containing thirty-one bills of sale of slaves, by us classed, marked, and put in the inventory under the double letter KK, No. 37.

Item. Another bundle containing fifty receipts or acquittances, by us classed, marked, &c. We then put said bundle in the inventory under the double letter LL, No. 38.

Item. A bundle containing three bills of exchange, supposed to be paid. These we classed and marked and put in the inventory under the double letters MM, No. 39.

Item. A bundle containing fourteen documents, valuing lands by approximation, and memoranda of moneys due the deceased. These we classed and marked, and the bundle was put in the inventory under the double letter NN, No. 40.

Item. Another bundle containing thirteen valuations relating to the Carondelet Canal. These we classed and marked in order, and the bundle was put in the inventory under the double letter OO, No. 41.

Item. Another bundle containing five powers of attorney drawn by

divers persons, which we classed and arranged in order, entering the bundle in the inventory under the double letter PP, No. 42.

Item. Another bundle containing forty-four documents relating to the settlement of accounts with D. W. Coxe. These we classed and arranged, entering the bundle in the inventory under the double letter QQ, No. 43.

Item. Another bundle containing seventy accounts settled or to be settled. These we classed and marked, and we inscribed the bundle on the inventory under the double letter RR, No. 44.

Item. A bundle containing forty-nine letters, a correspondence with divers persons. These we classed and marked, and we entered the bundle in the inventory under the double letter SS, No. 45.

Item. Another bundle containing forty-eight deeds of sale of lands on the bayou made by the deceased Daniel Clark to divers persons. These we classed, marked, &c., and we inscribed the bundle in the inventory under the double letter TT, No. 46.

Item. Another bundle containing nine deeds of sale in favor of Watkins. These we classed and marked, and we entered the bundle in the inventory under the double letter UU, No. 47.

Item. Another bundle containing forty papers of reference; these we classed and marked. The bundle was entered in the inventory under the double letter VV, No. 48.

Item. Another bundle containing fourteen plats and titles to property. These we classed and marked, and the bundle we entered on the inventory under the double letter WW, No. 49.

17 [10] Item. Another bundle containing thirty-five papers relating to the Bayou estate, which are classed and marked. The bundle we entered on the inventory under the double letter XX, No. 50.

Item. Another bundle containing twenty-nine titles or guarantees to Ouachita letters. These we classed and marked, and the bundle was put in the inventory under the double letter YY, No. 51.

Item. Another bundle containing twelve items relating to the Chapitoulas estate, which we classed and marked. The bundle was put in the inventory under the double letter ZZ, No. 52.

Item. Another bundle containing thirteen papers relating to the estate purchased from Amaud Magnan, which we classed and marked in order. The said bundle we entered in the inventory under the triple letter AAA, No. 53.

Item. Another bundle containing seven papers relating to the lot of ground near the ropewalk. These we classed and marked in order, and we entered the bundle in the inventory under the triple letter BBB, No. 54.

Item. Another bundle containing transfers of land purchased by D. Carlos Dehault de Lassus, for Daniel Clark, at St. Louis, in September, 1804, and re-transferred by the said Lassus to Daniel Clark, at Brontin office in 1805. These we classed and marked in order. The bundle was inscribed on the inventory under the triple letter CCC, No. 55.

Item. Another bundle containing two papers relative to the estate called the Dairy. These we classed and marked in order, and we inscribed said bundle in the inventory under the triple letter DDD, No 56.

Item. Another bundle containing two papers relating to the Atakapas lands purchased from the Macarty estate. These we classed and marked in order, and we entered the bundle in the inventory under the triple letter EEE, No. 57.

Item. Another bundle consisting of two transfers of land on Bayou Bœuf, made by William Welles and Alexander Fulton. These we classed

and marked in order, and we entered the bundle in the inventory under the triple letter FFF, No. 58.

Item. Another bundle containing plats, guarantees, or transfers of three thousand and two hundred arpens of land in Opelousas, purchased of Madam Larne Branet. These we classed and marked in order, and we entered the bundle in the inventory under the triple letter GGG, No. 59.

Item. Another bundle containing six plats, guarantees to, or transfers of sixteen hundred acres of land in Opelousas, purchased of Mr. Bronton. These we classed, marked, and entered on the inventory under the triple letter HHH, No. 60.

Item. Another bundle containing five plats, titles to, or transfers of lands situated at Baton Rouge, south of the boundary line, the exclusive property of Daniel Clark. These we classed and marked in order. The said bundle we put in the inventory under the triple letter III, No. 61.

Item. Another bundle containing two titles to, or plats of eleven arpens four toises, fronting on the Mississippi, near and above 18 [11] Lafourche, purchased of Simon Ducourneau. These we classed and marked in order, and we inscribed the bundle on the inventory under the triple letter JJJ, No. 62.

Item. Another bundle containing two papers relative to the Fischer estate, a la Tone au Bœuf. These we classed, marked in order, and we entered the bundle in the inventory under the triple letter KKK, No. 63.

Item. Another bundle containing four plats, transfers of, and guarantees to three thousand two hundred arpens of land in Opelousas, bought of Mr. Gradenigo. These we classed and marked in order, and we entered the said bundle under the triple letter LLL, No. 64.

Item. Another bundle containing four titles to land, from Mr. Fletcher. These we classed and marked in order, and we entered the said bundle on the inventory under the triple letter MMM, No. 65.

Item. Another bundle containing thirty-three titles to different possessions. These we classed and marked in order, and we entered the said bundle in the inventory under the triple letter NNN, No. 66.

Item. Another bundle containing twenty-two items, papers of John Lucques. These we classed and marked in order, and we entered the said bundle in the inventory under the triple letter OOO, No. 67.

Item. A bundle containing six transactions with Mr. Barrow. These we classed and marked in order, and we entered the said bundle in the inventory under the triple letter PPP, No. 68.

Item. Another bundle containing twenty-five papers, establishing accounts with F. L. Claiborne. These we classed and marked in order, and we inscribed the said bundle on the inventory under the triple letter QQQ, No. 69.

Item. A book, a memorandum of lands held in partnership by the deceased and Dr. William Coxe, of Philadelphia, containing twenty-seven written pages. This we classed and marked, and entered on the inventory under the triple letter RRR, No. 70.

Item. Another memorandum book of lands held in partnership by Dr. William Coxe, of Philadelphia, and the deceased, containing twenty written pages. This we marked and entered in the inventory under the triple letter SSS, No. 71.

Item. Another little book of accounts between the deceased and the late Dr. John Watkins, containing seven written pages. This we marked and entered in the inventory under triple letter TTT, No. 72.

The above were all the papers found in the aforesaid small trunk, and as the hour of adjournment is come, we, the beforesaid and undersigned register, with the consent of parties, have legalized the above, and have postponed further examination until to-morrow at six in the morning. After reading the preceding, we have transferred the small trunk and its contents to the said Richard Relf, the testamentary
19 [12] executor, who charges himself with the same, and who signed with us and the other parties and witnesses, on the day, month, and year as above, and we adjourned.

(Signed) MOREAU L'ISLET,
Representative of the Absent Heirs.
RICHARD RELF.
THOMAS BEALE, *Register.*
BLONDEAU.
PROSPER PRIEUR.

And to-day, the twenty-seventh of the month of August, in the year of our Lord one thousand eight hundred and thirteen, and the thirty-eighth of the declaration of the Independence of the United States of America, at four o'clock, we, Thomas Beale, register of wills for the city and parish of New Orleans, proceeded in our office, in the presence of all the parties and witnesses assembled, to select and classify the papers of the estate, which are enclosed in a trunk upon which was placed seal number two, which was recognized sound and intact by the said parties and witnesses, after which we proceeded as follows:

First. Sixty-three bundles containing, all together, four thousand five hundred letters from divers persons. These we classed and marked from one to number sixty-three, included.

Item. Another bundle containing one hundred and thirty-eight copies of letters (correspondence with divers persons). These we marked and put in the inventory as No. 64.

Item. Another bundle containing seventy-seven papers relative to tobacco, in connection with James Wilkinson. These we classed in the inventory No. 65.

Item. Another bundle containing ten papers relative to Walter Jones, which we classed and put in the inventory under No. 66.

Item. Another bundle containing eight papers relative to Colonel Bellechasse, which we classed and put in the inventory under No. 67.

This was all that was found in the aforesaid trunk upon which was placed seal No. 3, the seals being previously scrupulously examined and found intact, and acknowledged to be so.

First. Sixteen bundles containing, together, four hundred and forty-two papers relative to divers matters, such as accounts, receipts, acquittances. These we classed and marked, and placed upon the inventory from No. 68 to No. 83, included.

And as there were no other papers found in the aforesaid trunk, we, the aforesaid and undersigned register, legalized the above and handed over the above-mentioned trunks to the said Richard Relf, testamentary executor, who charges himself with them, and who signed with us and the other parties and witnesses, on the same day, month, and year as above.

MOREAU L'ISLET,
Representative of the Absent Heirs.
RICHARD RELF.
THOMAS BEALE,
Register.
BLONDEAU.
PROSPER PRIEUR.

20 [13] And to day, the twenty-eighth of the month of August, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the United States of America the thirty eighth, at ten o'clock in the morning, we, Thomas Beale, register of wills for the city and parish of New Orleans, went to the domicil on the Bayou road in which the late Daniel Clark died, in order to make out an inventory as to the description and value of the stock belonging to said estate. Here we met Richard Relf, testamentary executor of the said deceased, Louis Moreau L'Islet, lawyer, appointed by the court to represent the absent heirs; in the presence of whom we administered the oath to the Messrs. Prosper Prieur and Sebastien Blondeau to faithfully perform the duties of appraisers of all that might be presented to them as belonging to the said inheritance; after which, in the presence of all, we proceeded as follows:

ANIMALS.

First. A black cab horse, English blood, valued by the above-named appraisers at the sum of one hundred dollars.....	$100 00
Item. Twenty-three cows, average value twenty-four dollars; together, at five hundred and fifty-two dollars.....	552 00
Item. Five bulls, average value by the same appraisers eight dollars each; together, at forty dollars.....	40 00
Item. Three yoke of oxen, average value per pair by the same appraisers, thirty dollars; together, ninety dollars	90 00
Item. Twelve mules, average value by the same appraisers, thirty dollars; together, three hundred and sixty dollars...	360 00
Item. A sorrel horse, English blood, valued by same appraisers at fifty dollars	50 00
Item. A creole horse, valued by same appraisers at twenty dollars	20 00

These are all the animals presented to us to be put in the inventofy as belonging to the estate of the said deceased Daniel Clark; and the above being read, we found that the total of the valuations made amounts to the sum of twelve hundred and forty-two dollars.

We left the said animals in charge of said Richard Relf, who acknowledges it, and signs with us and the other parties and witnesses, on the same day, month, and year as above. We then withdrew.

(Signed).

MOREAU L'ISLET,
Representative of Absent Heirs.
RICHARD RELF.
THOMAS BEALE,
Register.
BLONDEAU.
PROSPER PRIEUR.

21 [14] SALE OF FURNITURE.

And to-day, the tenth day of the month of September, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the United States of America the thirty-eighth, at nine o'clock in the morning, we, Thomas Beale, register of wills for the city and parish of New Orleans, in virtue of the order of the honorable judge of probate of this city and parish, dated the twenty-seventh of August last, and after the advertisement prescribed by law, proceeded

on the Bayou road to the domicil in which the late Daniel Clark died, in order to effect the sale of the movables and animals belonging to said estate; here, in the presence of Richard Relf, testamentary executor of the deceased, Moreau de L'Islet, counsel named by the court to represent the absent heirs, and in the presence of the Messrs. Prosper Prieur and Sebastien Blondeau, witnesses living on the spot, proclaimed the sale in a loud and intelligence voice, on the following terms and conditions, to wit:

For all sums of and under one hundred dollars, cash; and for all sums exceeding one hundred dollars, a credit of sixty days; notes indorsed to satisfy the testamentary executor.

First. A high post bedstead, of cherry wood, with three mattresses of Spanish moss and ticking, a bolster, two pillows, and an old musquito bar of muslin, trimmed, bought by Mr. Milleborough for the sum of forty-nine dollars and fifty cents	$49 50
Item. A small bureau, walnut wood, Mr. Dusuau De la Croix, twenty-eight dollars	28 00
Item. A small cherry table, Mr. Perillat, senior, two dollars and fifty cents	2 50
Item. Another small folding table, cherry wood, Mr. Gourgon, six dollars and seventy-five cents	6 75
Item. A wardrobe of yellow wood, Mr. Milleborough, fifty dollars	50 00
Item. Twelve chairs, green wood, Mr. Milleborough, twenty-one dollars	21 00
Item. Nine other chairs, wood, painted green, Mr. Riano, thirteen dollars	13 00
Item. A pair of holster pistols, with bolsters, Samuel Elkins, seventeen dollars	17 00
Item. A dagger, silver mounted, Mr. Castaing, seven dollars	7 00
Item. Sabre, silver mounted, Mr. Poultney, twenty dollars	20 00
Item. Two pairs of razors, with small looking-glass, K. Paul Darcantel, three dollars and seventy-five cents	3 75
Item. A set of porcelain, composed of twelve cups, eleven saucers, a tea-pot, cream-jug, a sugar-bowl, and three plates, and a waiter painted red, M. Dusuau De la Croix, thirty-nine dollars	39 00
Amounting to	257 50
22 [15] Item. Another set of porcelain, consisting of twelve cups, twelve saucers, a coffee-pot, a bowl, and three plates, with a waiter painted black, Mr. Ogden, forty dollars	$40 00
Item. A porcelain pitcher and wash-basin, Mr. Gross, twenty-one dollars	21 00
Item. Two old card tables, cherry wood, M. Barau, eight dollars	8 00
Item. A folding table, cherry wood, M. Fleytas, ten dollars	10 00
Item. Case of mathematical instruments, M. Paul Darcantel, nine dollars and fifty cents	9 50
Item. Eighteen spoons and twelve forks, a soup ladle, sixteen coffee spoons, twenty-four cream spoons, and sugar tongs, the whole of silver, weighing one hundred and twenty-eight	

ounces, six grains, M. Poultney, one hundred and forty-three dollars	143 00
Item. A gold watch, double case, Samuel Elkins, ninety-three dollars	93 00
Item. A broken set, blue china, M. Ogden, one hundred and eleven dollars	111 00
Item. A piece of blue satin, forty yards, 32 "aunes" at $1.09 per aune, thirty-four dollars and eighty-eight cents, M. P. Guenon	34 88
Item. Nine other pieces of blue satins, altogether 384 aunes, at $1.06 per aune, four hundred and seven dollars and four cents	407 04
Item. A jar from Provence, M. Fortier, twenty-two dollars and fifty cents	22 50
Item. Another jar from Provence, M. Lacesne, twenty-two dollars and fifty cents	22 50
Item. Another jar from Provence, M. Fortier, twenty-three dollars	23 00
	1,202 92
Being $2,202 92	
Item. A filtering stone and jar, Lefevre, twelve dollars	12 00
Item. A saddle, M. Lynd, nineteen dollars and fifty cents	19 50
	1,234 42

The above is the whole of the furniture belonging to the estate.

LIBRARY.

First. Four volumes of the Spanish Treasury, Mr. Enmond Forstall, seven dollars	$7 00
Item. Eight vols. Roman History (English), Mr. Smith, eighteen dollars	18 00
23 [16] Item. Ten vols. Travels in North America, Mr. Dorfeuille, jr., twelve dollars	$12 00
Item. Eight vols. miscellaneous works, Mr. James Shepperd, eighteen dollars	18 00
Item. Six vols. Milton's Works, Mr. William Ross, twelve dollars and fifty cents	12 50
Item. Twenty-four vols. Swift's Works, Samuel Elkins, forty dollars	40 00
Item. Twenty-four vols. Swift's Works, Mr. Ellery, fifty-four dollars	54 00
Item. Twenty-five vols. Universal History, Mr. Curculla, forty-five dollars	45 00
Item. Seventeen vols. Shakespeare, Mr. Samuel Elkins, forty-nine dollars	49 00
Item. Three vols. miscellaneous, Mr. Poulteney, thirteen dollars	13 00
Item. Twenty-four vols. miscellaneous, Mr. Sevallos, forty-four dollars	44 00
Item. Four vols. Young Anacharsis, Mr. Dupuy, eleven dollars	11 00

Item. Six vols. Memoirs of the Times of Louis 16th, Albin Michel, twelve dollars fifty cents	12 50
	318 00
Being $318 00	
Item. Twenty-two vols. British Theatre, Mr. Smith, sixty-one dollars	61 00
Item. Twenty-five vols. Nicholson's Chemistry, Wm. Ross, seventy-one dollars	71 00
Item. Four vols. Odyssey (Greek), Mr. Dupuy, seven dollars and fifty cents	7 50
Item. Fourteen vols. different English works, Mr. Quertrain, seventy-five dollars	75 00
Item. Five vols. Plutarch (Greek), Mr. Milleborough, six dollars and fifty cents	6 50
Item. Eighteen vols. English Spectator, Samuel Elkins, thirty-one dollars	31 00
Item. Seven vols. various works, M. Ellery, nine dollars and fifty cents	9 50
Item. Eight vols. various works, M. Poulteney, twenty dollars	20 00
Item. Three vols. Tragedies (Sophocles), Latin translation, Mr. Allard, four dollars	4 00
Item. Fifty-four vols. English Encyclopedia, Mr. Clague, eighty-five dollars	85 00
Item. Three vols. "Maison Rustique," Francois Duplessis, twenty-one dollars	21 00
Item. Six vols. various works in Greek, Mr. Allard, four dollars	4 00
Item. Seven vols. Bacon's Works, Mr. Ellery, thirty-one dollars	31 00
24 [17] Item. Three vols. Don Quixotte (Spanish), Simon Cuculla, seventeen dollars	17 00
Item. One vol. Lexicon manual (English), Columbus Lawson, two dollars	2 00
Item. Eight vols. in Latin, Edmund Forestall, nine dollars	9 00
	772 50
Amounting to $772 50	
Item. Seven vols. various works, M. Maspero, ten dollars	10 00
Item. Thirteen vols. English poets, K. Fletcher, thirty-six dollars	36 00
Item. Four vols. of Virgil and Juvenal in Latin, Cr. Morel, eight dollars	8 00
Item. Five vols. various, Mr. Allard, seven dollars	7 00
Item. Nine vols. various works, M. Riane, seven dollars and fifty cents	7 50
Item. Three vols. various works, Mr. Ellery, seven dollars and fifty cents	7 50
Item. Eight vols. various works, Mr. Ogden, nineteen dollars	19 00
Item. Thirteen vols. various works, Mr. Korel, ten dollars	10 00
Item. Three vols. various works, Mr. Allard, three dollars	3 00
Item. Six vols. Pope's Works, Columbus Lawson, six dollars	6 00

Item. Twelve vols. various Spanish works, Mr. Hernan, seven dollars and fifty cents	7 50
Item. Five vols. of Geographical and Commercial Dictionary, Mr. Dupuy, seventeen dollars	17 00
Item. Seven vols. various works, Mr. Relf, seven dollars	7 00
Item. Five vols. various works, Samuel Elkins, six dollars	6 00
Item. Six vols. Theatre d'Agriculture, K. Lecesne, eight dollars and fifty cents	8 50
Item. Five vols. Natural History (Valmont de Beauman), Mr. Darcantel, ten dollars and fifty cents	10 50
Item. Eight vols. various works, Mr. Elkins, five dollars and fifty cents	5 50
	952 50
Amounting to $952 50	
Item. An Atlas, Mr. Casparo, sixteen dollars	16 00
Item. Eleven vols. various works, M. Lawson, eleven dollars and thirty cents	11 30
Seven vols. Travels in Italy, by Lalande, Mr. Garton, ten dollars	10 00
Item. Six vols. various works, M. Taulent, five dollars	5 00
Item. Three vols. various works, Mr. Ellery, three dollars and fifty cents	3 50
Item. Three vols. in Spanish, Mr. Cucullu, four dollars	4 00
25 [18] Item. Six vols. various works, Mr. Perrelat, ten dollars and fifty cents	$10 50
Item. Seven vols. Moral Tales of Marmontel, Mr. Dupuy, seven dollars	7 00
Item. Thirty-seven vols. various works, Mr. Sevallos, twenty-two dollars	22 00
Item. Three vols. various works, Peter Pedesclaux, one dollar	1 00
Item. One vol. an English and Spanish Dictionary, Mr. Castaing, five dollars and fifty cents	5 50
Item. Two vols. an English and Italian Dictionary, Columbus Lawson, four dollars and fifty cents	4 50
Item. Six vols. various works, Mr. Morel, three dollars	3 00
Item. Six vols. various works, Mr. Clague, four dollars	4 00
Item. Seven vols. various works, Jacques Martin, two dollars and twenty-five cents	2 25
Item. Eight vols. various works, Mr. Lawson, five dollars	5 00
Item. Nineteen odd vols., Mr. Ellery, five dollars	5 00
Item. Two vols. miscellaneous, Mr. Poultney	3 50
	1,075 25
Amounting to $1,075 25	
Item. Two vols. miscellaneous, Mr. Morel, two dollars and fifty cents	2 50
Total value of library	1,077 75

SHRUBBERY AND FLOWERS.

First. Six pots of flowers, bought by Mr. Laborterie, two dollars	$2 00
Item. Six pots of flowers, Mr. Laborterie, one dollar and eighty-seven and a half cents	1 87½

Item. Six pots of flowers, Mr. Laborterie, three dollars and seventy-five cents	3 75
Item. Six pots of flowers, Joseph Abat, twelve dollars	12 00
Item. Six pots of flowers, M. Laborterie, six dollars and twelve and a half cents	6 12½
Item. Six pots of flowers, Honore Landreaux, three dollars and thirty-seven and a half cents	3 37½
Item. Seven pots of flowers, Mr. Laborterie, five dollars and twenty-five cents	5 25
Item. Nine pots or boxes of flowers, M. Laborterie, ten dollars and twenty-five cents	10 25
Item. One agartrum, or rose myrtle bush, Mr. Guerlain, twenty-one dollars	21 00
Item. One agertrum, or rose myrtle bush, with the box, M. Guerlain, twenty-five dollars	25 00
Item. One lemon tree and box, Mr. Henderson, nine dollars	9 00
26 [19] Item. Six pots of flowers, M. Lynd, five dollars	$5 00
Item. Six pots of flowers, M. Lynd, five dollars	5 00
Item. Six pots of flowers, Mr. Ogden, three dollars	3 00
Item. Ten pots of flowers, Mr. Ogden, five dollars and twenty-five cents	5 25
	117 87½
Item. A box of mignionette, Mr. Darcantel, twelve dollars and fifty cents	12 50
Item. Six pots of flowers, M. Roque, three dollars and fifty cents	3 50
Item. Five pots and a barrel of flowers, M. Henderson, ten dollars	10 00
Item. Twelve pots of flowers, M. Lind, eleven dollars and fifty cents	11 50
Item. An olive tree, M. Guerlain, five dollars	5 00
Item. Twenty-four flower pots, empty, sound, or cracked, Mr. Guerlain, seven dollars and fifty cents	7 50
Item. One mango plant, with box, Mr. Guerlain, four dollars and twenty-five cents	4 25
Item. One lemon tree, with box, M. Dupuy, ten dollars	10 00
Item. One "floripondio" plant, with box, Joseph Nicholas, five dollars and twenty-five cents	5 25
Item. One banana plant, with box, seven dollars and fifty cents	7 50
Item. One "cachiman" plant, Mr. Darcantel, four dollars	4 00
Item. One lemon tree, with box, M. Roque	5 00
Item. Two plants of "pomellada," with box, M. Guerlain, four dollars	4 00
Item. One lemon tree, with box, M. Guerlain, twenty dollars	20 00
Item. One guava plant, with box, M. Dusuau De la Croix, sixteen dollars	16 00
Item. A shrub, name unknown, with box, Mr. Roque, eight dollars and twenty-five cents	8 25
Item. A banana plant, with box, M. Roque, six dollars	6 00
Item. A "floripondio" plant, with box, M. Roque, nine dollars and twenty-five cents	9 25
Item. Two pomellada plants, with boxes, Darcantel, eight dollars and fifty cents	8 50

Item. A small box of flowers, Mr. Darcantel, two dollars...	2 00
Item. A lemon tree, with box, Mr. Darcantel, eight dollars and fifty cents.....	8 50
Item. Two "floripondio" plants, with their boxes, eight dollars.....	8 00
Item. One bathing tub, M. Lynd, fifteen dollars.....	15 00
Total value of shrubs and flowers.....	309 87½

27 [20] Inasmuch as it is now past six o'clock, we, the aforesaid and undersigned register of wills, have legalized the above sale, and have adjourned the continuation until to-morrow, at ten o'clock in the morning; of which fact we have given notice in a loud and intelligible voice. After reading the foregoing, we found the proceeds of the sales of the house furniture to amount to the sum of twelve hundred and thirty-four dollars and ninety-two cents; the proceeds of the sale of the library, to one thousand and seventy-seven dollars and seventy-five cents; and, finally, that the shrubs and flowers to three hundred and nine dollars and eighty-seven cents and a half, which amount, together to the sum of two thousand six hundred and twenty-two dollars and fifty-four cents and one-half, which sum we have left at the disposal of Mr. Relf, testamentary executor, who receipts for the same, and who signs with us, the other partners and witnesses, on the same day, month, and year as above. We then withdrew.

(Signed) RICHARD RELF.
MOREAU L'ISLET,
Counsel for the Absent Heirs.
THOS. BEALE, *Register.*
BLONDEAU.
PROSPERE PRIEUR.

SALE OF STOCK.

To-day, on the eleventh of the month of September, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the United States of America the thirty-eighth, at ten o'clock in the morning, we, Thomas Beale, register of wills for the city and parish of New Orleans, repaired upon the Bayou road, to the domicil in which late Daniel Clark died, to proceed with the continuation of the sale of the movables belonging to the said estate; here, in the presence of Messrs. Richard Relf, testamentary executor; Louis Moreau L'Islet, the lawyer appointed by the court to represent the absent heirs, and in that of the Messrs. Prospere Prieur and Sebastien Blondeau, the witnesses summoned, announced the said sale on the following terms and conditions, viz: cash for all sums not exceeding one hundred dollars, and a credit of sixty days, with notes of approved security for all over one hundred dollars.

ANIMALS.

First. A black cab horse (English race) bought by Mr. P. F. Dubourg, one hundred and thirty dollars.....	$130 00
Item. A red cow and her calf, M. Milleborough, twenty-five dollars and twenty-five cents.....	25 25
Item. Another red cow and her calf, M. Milleborough, twenty-two dollars.....	22 00

Item. A red cow and her calf, M. Darcantel, eighteen dollars	18 00
REC. 345 70*	
28 [21] 'tem. A red cow and her calf, M. Darcantel, sixteen dollars	$16 00
Item. A black and white cow and her calf, M. Lechesne, seventeen dollars	17 00
Item. A white cow and her calf. M. Baron, twenty dollars	20 00
Item. A brown cow with her calf, Jacques Guy Dreux, fifty-eigqt dollars	58 00
Item. A brindle cow and her calf, M. Relf, fifty-four dollars.	54 00
Item. A brown cow, about to calve, M. Cadet Dejean, forty-five dollars	45 00
Item. Another red cow, without a calf, M. Coiron, twenty-eight dollars	28 00
Item. A black cow, without a calf, M. Cadet Dejean, twenty-two dollars	22 00
Item. A red roan cow, without a calf, M. Coiron, twenty-five dollars	25 00
Item. A cream-colored cow, without a calf, M. Cadet Dejean, twenty-five dollars	25 00
	505 25
Item. A red polled cow, without a *cow*, Louis Sere, forty-three dollars	43 00
Item. A red cow without a calf, M. Lecesne, nineteen dollars.	19 00
Item. A cow without a calf, Lecesne, twenty-eight dollars	28 00
Item. A black cow without a calf, M. Bonnefoy, seventeen dollars	17 00
Item. A red cow without a calf, M. Relf, twenty-six dollars.	26 00
Item. A cream-colored cow without a calf, M. Cadet Dejean, thirty-five dollars	35 00
Item. A cow with a white back, without a calf, M. Darcantel, thirteen dollars	13 00
Item. A cream-colored cow without a calf, M. Cadet Dejean, fifteen dollars	15 00
Item. A red cow without a calf, M. Coiron, sixteen dollars	16 00
Item. A cream-colored cow, M. Hopkins, eighteen dollars	18 00
Item. A young red heifer, M. Coiron, thirteen dollars	13 00
Item. A young red heifer, M. Fleytas, nine dollars	9 00
Item. A young red heifer, Peter Guenon, seven dollars and fifty cents	7 50
Item. Two small bulls, M. Blanc, twenty dollars	20 00
Item. A pair of oxen, M. Lecesne, thirty-six dollars	36 00
Item. A pair of oxen, M. Lecesne, thirty-seven dollars	37 00
Item. A pair of oxen, M. Lecesne, twenty-nine dollars.	29 00
29 [22] Item. Two mules, M. Cadet Dejean, eighty dollars.	$80 00
Item. Two mules, M. Coiron, ninety-four dollars	94 00
Item. Two mules, Madame Faisandieu, sixty dollars	60 00
	1,120 75
Item. Two mules, M. Coiron, sixty-one dollars	61 00
Item. Two mules, Madame Faisandieu, fifty-three dollars	53 00
Item. Two mules, M. Coiron, seventy-five dollars	75 00
Item. A sorrel horse, English horse, M. Lecesne, sixty dollars	60 00

Item. A creole horse, M. Lecesne, thirty-two dollars.....	32 00
Item. A mouse-colored horse, Charles Ducondreau, twenty dollars.....	20 00
	1,421 75

And as no other animals were presented for sale to us, as belonging to the estate of the said deceased Daniel Clark, we, the aforesaid and undersigned register, legalized the above; and this act being read, we found the proceeds of the animals sold to amount to the sum of fourteen hundred dollars and seventy-five cents, which we have left to the disposition of Mr. Relf, who charges himself with it, and who signs with us, and the other parties and witnesses, on the same day, month, and year as above. We then withdrew.

(Signed)

BLONDEAU,
MOREAU L'ISLET,
Counsel for Absent Heirs.
PROSPERE PRIEUR.
RICHARD RELF.
THOMAS BEALE,
Register.

INVENTORY OF THE CHAPITOULAS ESTATE.

To day, the twenty-eighty of the month of September, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the United States of America the thirty-eighth, at four o'clock in the morning, we, Thomas Beale, register of wills for the city and parish of New Orleans, repaired to a plantation, the property of the late Daniel Clark, situated six leagues above this city, on the same side of the river, on the coast of Chapitoulas, in order to continue the inventory as to description and value of the property left by the said late Daniel Clark.

On our arrival we met the Sieur Richard Relf, testamentary executor; L. Moreau L'Islet, the advocate appointed by the court to represent the absent heiress; and in their presence we administered the oath to Messrs. P. Baron Boisfontaine and L'Isle Sarpy, the appraisers named by the testamentary executor, to acquit themselves faithfully of their trust, in valuing all that might be presented to them as belonging to said estate.

30 [23] After which, all being present, we proceeded as follows:

Movables and furniture:

First. Six chairs, valued by the said appraisers at six dollars.	$6 00
Item. One mattress, five dollars.....	5 00
Item. Two bedsteads, six dollars.....	6 00
Item. Two tables, three dollars.....	3 00
Item. Two medicine chests, twenty dollars.....	20 00
Item. Two pairs of andirons, ten dollars.....	10 00
Item. One water jar, twelve dollars.....	12 00
Item. Two pairs of sheets, ten dollars.....	10 00
Item. One kitchen range, twenty-five dollars.....	25 00

Agricultural implements:

Fourteen ploughs, valued by the said appraisers at two hundred *at* ten dollars.....	210 00
Item. Two mould boards, twenty dollars.....	20 00

Item. Two large harrows, ten dollars	10 00
Item. Four cultivators, twelve dollars	12 00
Item. Eight small carts, two hundred and eighty dollars	280 00
Item. Two wheelbarrows, five dollars	5 00
Item. Fifty hoes, fifty dollars	50 00
Item. Fifteen spades, twenty-five dollars	25 00
Item. A set of blacksmith's tools, two hundred dollars	200 00
Item. Thirty hatchets, forty-five dollars	45 00
	954 00
Item. Two , valued at two dollars	$2 00
Animals:	
Item. Twelve yoke of oxen, at $40 per oxen	480 00
Item. Twenty-four mules, fourteen hundred and forty dollars	1,440 00
Item. Five horses, fifty-dollars each	250 00
Item. Fifteen cows, at twenty-five dollars each	375 00
Item. Seven yearling steers, eight dollars each	56 00
Item. Eight calves, five dollars each	40 00
Item. Two bulls, ten dollars each	20 00
Item. Sixty four sheep, four dollars each	256 00
	3,873 00

The above were all the movables, agricultural instruments, and animals found upon the said estate.

SLAVES.

First. Doctor, negro, aged fifty, valued at two hundred and fifty dollars	$250 00
Item. Hector, negro, aged twenty-seven years, valued at five hundred dollars	500 00
31 [24] Item. January, negro, aged sixty, sixty dollars	$60 00
Item. William, negro, thirty, seven hundred dollars	700 00
Item Stuard, negro, thirty-five, four hundred dollars	400 00
Itam. Jem, negro, six hundred and fifty dollars	650 00
	2,560 00
Item. Kersey, negro, blind, forty years, not valued, but inserted here merely by way of memorandum.	
Item. Morice, negro, thirty-three hundred dollars	300 00
Item. Kett, negro, fifty-five, two hundred and fifty dollars	250 00
Item. Brown, negro, sixty-six, sixty dollars	60 00
Item. John, negro, thirty-three, seven hundred dollars	700 00
Item. Wing, negress, with her child David, one year old, four hundred and fifty dollars	450 00
Item. Old Esther, negress, sixty, two hundred dollars	200 00
Item. Billy, negro, six, one hundred dollars	100 00
Item. Annie, negress, twenty, four hundred and fifty dollars	450 00
Item. James M'Call, negro, twenty three, six hundred dollars	600 00
Item. Phil, negro, twelve, four hundred dollars	400 00

Item. Betty, negress, with her child Amy, six months old, four hundred and fifty dollars	450 00
Item. Mouthon, negro, fifty, four hundred dollars	400 00
Item. Esther, thirty-five, four hundred dollars	400 00
Item. Morning, negress, fourteen, three hundred dollars	300 00
Item. Sam, negro, forty-five, five hundred dollars	500 00
Item. Old Kate, negress, fifty, two hundred	200 00
Item. Grace, girl, ten, three hundred dollars	300 00
Item. Elijah, boy, ten, four hundred dollars	400 00
Item. James, negro, thirty, seven hundred dollars	700 00
Item. Rose, negress, thirty, and her infant Dan, one year old, four hundred and fifty dollars	450 00
Item. Anna, negress, thirty, three hundred and fifty dollars	350 00
Item. Bird, negro, fifteen, four hundred dollars	400 00
Item. Patty, negro boy, thirteen, three hundred dollars	300 00
Item. Lawrence, negro, carpenter, thirty-five, seven hundred	700 00
Item. Franky, negro, thirty, four hundred dollars	400 00
Item. John, negro boy, ten, three hundred dollars	300 00
Item. Charles, negro boy, seven, two hundred dollars	200 00
Item. McKinsy, negro boy, five years, one hundred dollars.	100 00
Item. Margaret, girl, three years, one hundred dollars	100 00
Item. Fanny, negress, twenty-five, and Mary her infant, one year old, four hundred and fifty dollars	450 00
32 [25] Item. Nelson, boy, nine years, two hundred and fifty dollars	$250 00
Item. Major, boy, seven years, onehundred and fifty dollars	150 00
Item. Waimy, negress, twenty-six, and her three children, Heleck, five years, Bouky, four, and Maria, two years old, seven hundred dollars	700 00
Item. Spencer, negro, forty-seven, six hundred dollars	600 00
Item. Themar, negress, twenty-five, four hundred and fifty dollars	450 00
	15,670 00
Item. Old Major, so old and infirm as to be entered merely as a memorandum.	
Item. Darky, negro, thirty, rheumatic, one hundred dollars.	100 00
Item. Doriana Smith, sixteen, two hundred and fifty dollars.	250 00
Item. Cambridge, negro, forty, four hundred and fifty dollars	450 00
Item. Rachel, negress, twenty-six, four hundred and fifty dollars	450 00
Item. S. Wenny, twenty years of age, four hundred and fifty dollars	450 00
Item. Sarah, negress, twenty-six years, five hundred dollars.	500 00
Item. Judith mulatto woman twenty-seven, four hundred and fifty dollars	450 00
Item. Polly, negress, twenty-seven, four hundred and fifty dollars	450 00
Item. Fanny, negress, twenty-two, five hundred dollars	500 00
Item. Nace, negro, thirty-six, six hundred dollars	600 00
Item. Kery, negress, twelve, three hundred and fifty dollars.	350 00
Item. Tom, boy, eight, three hundred and fifty dollars	350 00
Item. Nany, negress, eighteen, four hundred and fifty dollars	440 00

Item. Washington, negro, twenty-five years, crippled in one hand, three hundred dollars	300 00
Item. Kitty, negress, twenty years, with her child some four months old, four hundred dollars	400 00
Item. Betty, negress, twenty-six, four hundred dollars	400 00
Item. George, negro, forty, six hundred dollars	600 00
Item. Old Rachel, fifty, three hundred dollars	300 00
Item. Dina, negress, sixty years, one hundred and fifty dollars	150 00
Item. Dave, boy, five years, one hundred and fifty dollars	150 00
Item. Levy, boy, five years, one hundred dollars	100 00
Item. Anthony, negro, seventy years, fifty dollars	50 00
Item. Rachel, negress, sixteen, four hundred dollars	400 00
33 [26] Item. Charlotte, negress, sixteen, three hundred and fifty dollars	$350 00
Item. Waldrin, negro, fifteen, four hundred dollars	400 00
Item. Patame, negress, thirteen, three hundred and fifty dollars	350 00
Item. Sukey, negress, thirteen, three hundred and fifty dollars	350 00
Item. Lidly, forty years, four hundred dollars	400 00
Item. Maimy, negress, fifteen, four hundred dollars	400 00
Item. Sukey, thirteen, three hundred and fifty dollars	350 00
	27,220 00
Item. Nelly, girl, three years, one hundred and fifty dollars	150 00
Item. Betsy, girl, ten years, three hundred dollars	300 00
Item. Ben, negro, twenty-six, five hundred dollars	500 00
Item. Jenny, negress, twenty-six, four hundred and fifty dollars	450 00
Item. Kelly, girl, five, one hundred and fifty dollars	150 00
Item. Henrietta, girl, eight, two hundred and fifty dollars	250 00
Item. Bob, quadroon, sixteen, three hundred dollars	300 00
Item. Eley, negro, thirty-nine, as he has an ulcer, valued at one hundred dollars only	100 00
Item. Kitty, negress, seventeen years, four hundred dollars	400 00
Item. Peggy, negress, forty, four hundred dollars	400 00
Item. Hertas, negro, twelve, four hundred and fifty dollars	450 00
Item. Thomas, thirty, valued at two hundred and fifty dollars only, as he has the gravel	250 00
Item. Sally, negress, sixteen, five hundred dollars	500 00
Item. Ritty, mulatto, fifteen, four hundred dollars	400 00
Item. Anny, negro, thirty-five, two hundred dollars	200 00
Item. Williams, boy, two years old, fifty dollars	50 00
Item. Ben, blacksmith, fifty, five hundred and fifty dollars	550 00
	32,870 00
Item. Anny, negress, thirty, four hundred dollars	400 00
Item. Raily, negress, twenty-four, five hundred dollars	500 00
Item. Jenny, weaver, thirty-nine, five hundred dollars	500 00
Item. James, negro, fifteen, four hundred dollars	400 00
Item. Rachel, negress, thirty, three hundred and fifty dollars	350 00
Item. Jack, twenty-six, six hundred dollars	600 00
Item. Mary, thirty, five hundred dollars	500 00
34 [27] Item. Joe, fifteen, five hundred dollars	$500 00

Item. Sukey, twelve, three hundred and fifty dollars	350 00
Item. Victoire, 10 years, $300	300 00
Item. Joe, mulatto, 16 years, $400	400 00
Item. Rachel, 15 years, $500	500 00
Item. Piggy, 10 years, $300	300 00
Item. James Harris, 36 years, $500	500 00
Item. Rachel, 25 years, $400	400 00
Item. George, 8 years, $250	250 00
Item. James, 10 years, $100	100 00
Item. Champagne, $50	50 00
Item. Rose, 25 years, $400	400 00
	39, 670 00
Item. Anny, 5 years, $100	100 00
Item. Tom, 1 year, $50	50 00
Item. Zago, 15 years, $400	400 00
Item. Peter, 50 years, $450	450 00
Item. Mary, 39 years, $250	250 00
Item. Deck, 40 years, $300	300 00
Item. Chloe, 35 years, $300	300 00
Item. James, 50 years, $300	300 00
Item. Mary, 50 years, $150	150 00
Item. Nelly, 30, and her son Daniel, 2 years $350	350 00
Item. Darkey, 25 years, $400	400 00
Item. Daniel, 6 years, $150	150 00
Item. Louis, 5 years, $100	100 00
Item. Sally, 3 months, $50	50 00
Item. Luke, 30 years, $500	500 00
Item. George, 10 years, $300	300 00
Item. Peggy, 22 years, $150	150 00
Item. Yob, 9 years, $300	300 00
Item. Jack, 18 years, $600	600 00
Item. Nathon, 28 years, $450	450 00
Item. Yaby, 30 years, $300	300 00
Item. Geoffry, 11 years, $350	350 00
Item. Phil, 40 years, $500	500 00
Item. David, 12 years, $300	300 00
Item. David, 12 years, $300	300 00
Item. James Sheling, 31 years, idiotic, $50	50 00
Item. Lucy Morrow, 40 years, $400	400 00
Item. George, 10 years, $200	200 00
Item. Rose, aged 27 years, with Rob, her infant, valued at $350	350 00
Item. Rosette, 24 years, $450	450 00
Item. Hannah, 26 years, $300	300 00
Item. Judith, 28 years, $400	400 00
Item. Kitty, 26 years, $350	350 00
Item. Silva, 22 years, $450	45 00
35 [28] Item. Kitty, 25 years, $350	$350 00
Item. Julia, 23 years, with her three children; John, aged 9; Quako, aged 5; and Jenny, aged 3; all valued at	750 00
	41, 120 00
Item. Louisa, aged 13, valued at $450	450 00

Item. Little Jim, aged 11, valued at $400..... ..... 400 00
Item. Jerry, mulatto, aged 16, valued at $400 ..... 400 00

42,370 00

The above are all the negroes presented to us belonging to the estate of the late Daniel Clark.

PLANTATION.

Item. The plantation upon which we now are, having a front on the river of twenty-four acres and a half, running to the lake, bounded on one side by Mr. Cadet Fortier, and on the other by a William Kenner.

Upon the plantation are the following buildings, provisions, and crops:

Buildings:

A refinery, a small house for proprietor, eighty negro cabins, a pigeon-house, and a small blacksmith shop.

Provisions:

A thousand bushels of corn.

Crops:

Fifty acres planted in cane.

The whole of said plantation, buildings, crops, and provisions are valued by the same appraisers at $50,000; and as nothing more was present to us as belonging to said estate, we, the aforesaid, and undersigned register, have legalized the foregoing at six o'clock; and after reading the foregoing, we found the valuation of the movables, animals, &c., to amount to $3,830; that of the sixty-five slaves, of every sex and age, $52,077; and lastly, the above described plantation to $50,000.

The whole amounting to $106,643; the which furniture, movables, animals, slaves, and plantation we charged to the said Richard Relf, testamentary executor, who acknowledges the same, and who signs with us, and the other parties and witnesses, on the same day, month, and year as above. We then retired.

(Signed) MOREAU L'ISLET,
Representative of the Absent Heirs.

(Signed) RICHARD RELF.
L'ILLE SARPY.
THOMAS BEALE,
Register of Wills.

36 [29] And to-day, the fourth of October, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the United States of America the thirty eighth, at ten in the morning, we, Thomas Beale, register of wills for the city and parish of New Orleans, went to the coffee-house of the New Exchange to sell to the highest bidder the slaves belonging to the estate of the late Daniel Clark. Being there, we met Richard Relf, the testamentary executor of the deceased, Louis Moreau L'Islet, the lawyer named by the court to represent the absent heirs, and in their presence and in that of Messrs. Prospere Prieur and Sebastien Blondeau, proclaimed the said sale, on the following terms and conditions:

The conditions of the sale are six months' credit, notes endorsed to satisfy the executor, and a special mortgage until paid in full.

First. Sam Harris, Rachel, Georges, Jacques, and Champion, aged respectively 26, 25, 8, 6, and 1 years, Mr. Souiat Dufossat, for twelve hundred and sixty dollars $1,260 00

Item. Lago, aged 15, M. Blanque	400 00
Item. Darked, aged 25, with her three children; Daniel, aged 6; Lewis, 5; and Sally, three months, M. Augustin Massicot	790 00
Item. Mary, aged 35, Montegat, the son	310 00
Item. David, aged 12, Francois Juillet	410 00
Item. David, aged 12, M. Beaulieu	315 00
Item. Hannah, aged 30, with her two children, Bird, 15 years old, and Patty, 13, M. Dupuy	1,260 00
Item. Polly, aged 27, M. Denreu	400 00
Item. Fanny, aged 22, M. Souiat Dufossat	500 00
Item. Betty, aged 20, with her infant, M. Morand	495 00
	5,645 00
Item. Old Rachel, aged 50, Samuel Elkens	260 00
Item. Rachel, aged 16, Dumas, son	415 00
Item. Waldron, aged 15, M. Sagon	500 00
Item. Jenny, aged 26, with her two children, M. Fortier	850 00
Item. Suckey, aged 13, Lachataignerais	395 00
Item. Ben, aged 50, and Amy, 30, M. Vesloins	950 00
Item. Peggy, negress, aged 10 years, adjudged to Mr. Brusle for the sum of three hundred and sixty-five dollars	365 00
Item. Eliza, and her child, adjudged to M. Francois Labane, for the sum of six hundred and ninety dollars	690 00
Item. Isaac, mulatto, aged about 18 years, adjudged to Mr. Celestin Aran, for the sum of five hundred and twenty dollars	520 00
	11,145 00

And seeing that many other slaves have been exposed for sale, and that they have not brought the estimated price, that it is two o'clock 37 [30] in the afternoon, and but few bidders, we, the above-mentioned and undersigned register, have, by the consent of the parties, postponed the sale until to-morrow at ten o'clock, of which we have informed the public in a distinct and intelligible voice, and after having examined the present, we have found the amount of the sale to be eleven thousand one hundred and forty-five dollars, which we have left at the disposition of Richard Relf, testamentary executor of the deceased, who acknowledged it, charged himself with it, and signed with us and the other parties and witnesses, the same day, month, and year as above, and we retired.

(Signed) RICHARD RELF.
MOREAU L'ISLET,
Defender of the Absent Heirs.
THOS. BEALE,
Register of Wills.
BLONDEAU.
PROSPER PRIEUR.

Reappraisement of the slaves.

And to-day, the 5th day of the month of October, of the year of our Lord one thousand eight hundred and thirteen, and the thirty-eighth of the Independence of the United States of America, in virtue of the order of the honorable James Pitot, judge of the court of probates for the city and parish of New Orleans, we, Thomas Beale, register of wills for the city

and parish, proceeded to a new appraisement of the negroes arising from the succession of the late Daniel Clark, and that in presence of Richard Relf, testamentary executor, Louis Moreau L'Islet, advocate appointed by the court to represent the absent heirs, and by the agent of Messrs. Dusuau De la Croix, Chevalier Macarty, and P. Baron Boisfontaine, appraisers chosen by the testamentary executor, who have received from us the oath to comport themselves well and faithfully in the discharge of their duties, and have in presence of all proceeded as follows:

Firstly. Toby, negro, aged 30 years, with Jeffry, aged eleven years, estimated together by the same at the sum of six hundred dollars $600 00

Item. Molly, negress, aged forty-six years, with her three children, Nancy, negress, aged eighteen years; Kery, aged twelve years; and Tom, aged eight years, estimated by the same at the sum of fourteen hundred dollars. 1,400 00

Item. Nancy, negress, aged eighteen years, estimated by the same at four hundred dollars. 400 00

Item. Dina, negress, aged sixty years, with James, her child, aged fifteen years, estimated by the same at the sum of five hundred dollars 500 00

Item. Charlotte, negress, aged sixteen years, estimated by the same at the sum of three hundred dollars 300 00

Item. Kitty, negress, aged seventeen years, estimated by the same at the sum of three hundred and eighty dollars 380 00

38 [31] Item. Peggy, negress, aged forty years, with her child, named Jerry, aged ten years, estimated by the same at the sum of seven hundred dollars.... $700 00

Item. Arthur, negro, aged twelve years, estimated by the same at the sum of four hundred dollars 400 00

Item. Sally, aged sixteen years, and Kitty, aged fifteen years, estimated by the same at the sum of eight hundred dollars. 800 00

Item. Rady, negress, aged twenty years, estimated by the same at the sum of four hundred dollars 400 00

Item. Rachel, negress, aged thirty years, estimated by the same at the sum of three hundred dollars..... 300 00

Item. Liddy, negress, aged forty years, with her five children, named Minny, aged fifteen years; Sukey, aged thirteen years, Betsy, aged ten years; Edmond, aged seven years; and Nelly, aged three years, estimated by the same at the sum of sixteen hundred dollars..... 1,600 00

And seeing that there were no other slaves to be valued, we, the above-mentioned and undersigned register, have closed and arrested the present, and, after having read it, we have found the amount of the revaluation to be the sum of eight thousand one hundred and eighty dollars, and the parties, appraisers, and witnesses have signed with us the same day, month, and year as above.

(Signed) MOREAU L'ISLET,
Defender of the Absent Heirs.
RICHARD RELF.
THOMAS BEALE, *Register.*
BLONDEAU.
PROSPER PRIEUR.

On this day, the fifth day of the month of October, of the year of our Lord one thousand eight hundred and thirteen, and the thirty-eighth of

the Independence of the United States of America, at ten o'clock a. m., we, Thomas Beale, register of wills for the city and parish of New Orleans, went to the cafe of the New Exchange for the purpose of continuing the sale of slaves arising from the succession of the late Daniel Clark; where, being in the presence of Richard Relf, testamentary executor of the said deceased, Lewis Moreau L'Islet, advocate appointed by the court to represent the absent *him*, and in that of Prosper Prieur and Sebastien Blondeau, witnesses, by us summoned, proclaimed the above sale in the same terms and condition above announced.

Firstly. Toby, aged thirty years, and Jeffry, aged eleven years, adjudged to Mr. John Trudeau for the sum of six hundred and five dollars..... $605 00

Item. Molly, negress, aged forty-six years, with her three children, named Nancy, aged eighteen years; Kery, aged twelve years; and Tom, aged eight years, adjudged to Mr. Celestin Avare for the sum of fourteen hundred dollars..... 1,400 00

39 [32] Item. Nancy, negress, aged eighteen years, adjudged to Mr. Bonnefoi for the sum of four hundred and fifteen dollars..... $415 00

Item. Dina, negress, aged sixty years, with James, aged fifteen years, adjudged together to Mr. James Nado for the sum of five hundred dollars..... 500 00

Item. Charlotte, aged sixteen years, adjudged to Mr. Lecenne for the sum of three hundred dollars..... 300 00

Item. Betty, negress, aged seventeen years, adjudged to Mr. Deyroud for the sum of three hundred and eighty dollars.. 380 00

Item. Peggy, negress, aged forty years, with her child named Jerry, aged ten years, adjudged to Mr. Edmund Macarty for the sum of seven hundred dollars..... 700 00

Item. Arthur, a little negro, aged twelve years, adjudged to Mr. Jaublanc for the sum of four hundred dollars..... 400 00

Item. Sally, aged sixteen years, and Kitty, aged fifteen years, adjudged to Mr. Labarre for the sum of eight hundred and thirty-five dollars..... 835 00

Item. Ready, negress, aged twenty-four years, adjudged to Mr Verbois for the sum of four hundred and twenty-five dollars 425 00

Item. Rachel, negress, aged thirty years, adjudged to Mr. Thomas Beale for the sum of four hundred and thirty dollars..... 430 00

Item. Lidley, negress, aged forty years, with her five children, named Mirny, aged five years, Sukey, aged thirteen years, Betsey, aged ten years, Edmund, aged seven years, and Nelly, aged three years, adjudged together to Madame Louis Trudeau, widow, for the sum of seventeen hundred and five dollars..... 1,705 00

Item. Patience, negress, aged thirteen years, adjudged to Mr. Pascalis, for the sum of three hundred and fifty dollars.... 350 00

Item. Ruff, Jerry, and William, adjudged to Mr. Macarty for the sum of six hundred and fifty dollars..... 650 00

Item. Nelly, and her child, adjudged to Mr. Kirby, for the sum of three hundred and fifty dollars..... 350 00

And seeing that there are no more slaves found to be sold arising from the succession of the late Daniel Clark, we, above-mentioned and un-

dersigned register, have closed and arrested the present, and having read it, we have found the amount of the sale made to be the sum of nine thousand seven hundred and eighty-five dollars, which has been left to the disposition of the said Richard Relf, testamentary ex-
40 [33] ecutor, who acknowledges it, charges it to himself, and has signed with us and our witnesses, the same day, month, and year above mentioned, and we retired.

RICHARD RELF.
THOMAS BEALL,
Register.

BLONDIEU.
PROSPER PRIEUR.

And this day, the twenty-seventh day of the month of January, in the year of our Lord one thousand eight hundred and fourteen, and the thirty-eighth of the Independence of the United States of America, at noon, we, Thomas Beale, register of wills for the city and parish of New Orleans, went to the cafe of the New Exchange for the purpose of proceeding in the sale of a number of negroes, arising from the succession of the late Daniel Clark, where being, we found Richard Relf, one of the testamentary executors of the deceased, Louis Moreau L'Islet, advocate appointed by the court to represent the absent heirs, and have in their presence, and in that of Prospere Prieur and Sebastian Blondeau, proclaimed the above-mentioned sale in a loud and intelligible voice, in the following terms and conditions, to wit: six months credit allowed on bills indorsed to the satisfaction of the testamentary executor, with special hypothecation until full payment.

And after having successively exposed for sale all the divers negroes arising from the succession of the late Daniel Clark, we, the above-mentioned and undersigned register, have withdrawn them all by the consent of the parties, as it appears that they would not bring the estimated price, and the parties and witnesses signed with us, after reading had, the same day, month, and year, as above, and we retired.

RICHARD RELF.
PROSPER PRIEUR.
BLONDEAU.

41 UNITED STATES OF AMERICA,

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify, that the foregoing 33 pages contain and form a full, complete, true and perfect transcript of the "omitted evidence" as per agreement of parties hereto annexed in the case of Myra Clark Gaines vs. P. H. Monsseaux et als., Mrs. Eliza Davis, Widow Kenner, appellant, No. 3663 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 31st day of December, A. D. 1880.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify, that Francis A. Woolfley, whose name is signed to the

above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 31st day of December, A. D. 1880.

EDWARD C. BILLINGS,
Judge.

(Indorsed:) Supreme Court U. S., 1880, October term, No. 218. Eliza Davis, widow, &c., appl't, vs. Myra Clark Gaines. Stipulation of counsel and addition to record. Filed 4 Jan'y, 1881.

OFFICE SUPREME COURT U. S.
FILED
JAN 11 1881
JAMES R. BRIGHAM
CLERK

Rebd

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 218.

ELIZA DAVIS, WIDOW OF MINOR KENNER, DECEASED, APPELLANT.

vs.

MYRA CLARK GAINES, APPELLEE.

Brief of J. D. ROUSE, *Solicitor for Appellant.*

J. D. ROUSE,
Solicitor for Appellant.

January 8th, 1881.

L. Graham & Son, print, 127 Gravier st.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 218.

ELIZA DAVIS, WIDOW OF MINOR KENNER, DECEASED, APPELLANT.

vs.

MYRA CLARK GAINES, APPELLEE.

Brief of J. D. ROUSE, *Solicitor for Appellant.*

STATEMENT OF THE CASE.

This is one of the so-called "Gaines Cases," but only in name, as its determination depends mainly upon questions not presented or discussed in this Court in the cases which have preceded it. The facts chronologically stated are as follows:

Daniel Clark, from whom Mrs. Gaines derives all her alleged rights, purchased the real estate in dispute from one Stephen Henderson, on the 16th day of December, 1812, wholly upon terms of credit. The price was $120,000, to be paid as follows, with six per cent.

interest: To Stephen Henderson, the vendor, $20,000 January, 1st, 1814, 1815, 1816 and 1817, and the balance of $40,000 to one I. E. Trask, within ten years from May 2, 1812. A mortgage to secure the price was retained upon the property in the act of sale.

Clark died on the 16th day of August, 1813, without having paid any part of the price of the property. By a will dated May 20, 1811, he bequeathed all his property to his mother, Mary Clark, and appointed Richard Relf and Beverley Chew his executors. The will was proved as his last will and testament, before the Probate Court for the parish and city of New Orleans, on the 17th of August, 1813, and letters testamentary issued to Richard Relf (Chew being absent from the State), as sole executor on the 27th of the same month.

On the 27th of August, 1813, Relf petitioned the said Court for authority to sell the real and personal estate left by the testator, which the Court duly granted.

Thomas Beales, Register of Wills for the parish of Orleans, and the officer charged by law with the duty of executing all orders for the sale of estates of deceased persons under administration, advertised and offered the real estate in controversy, for sale by public auction, as a part of the estate of Daniel Clark, on the 8th day of November, 1813. It was struck off to Michel Fortier, Jr., and Omer Fortier, for $120,000. Forty thousand dollars was to be paid May 1, 1822, and the balance in six equal annual installments, beginning March 1, 1815, all bearing six per cent. interest, and secured by a mortgage upon the property.

Relf, the executor, transferred the property to the purchasers, and in his deed stipulated to apply the price of the sale as fast as received, to the discharge of the mortgage of $120,000 placed upon the property by Daniel Clark, as aforesaid, December 10, 1812.

The Fortiers subsequently sold the property to other parties, and those again sold, but in each conveyance provision was made for the payment of the Henderson mortgage.

On the 10th day of January, 1818, Stephen Henderson, by an authentic act, passed before John Lynd, Notary, acknowledged to have received of Richard Relf, executor, full payment of the $80,000 due him by the estate of Clark, and directed the cancellation of the mortgage as to that sum. On the 6th day of December, 1825, Joseph Saul, who had become the owner of the $40,000 due I. E. Trask under the mortgage, acknowledged payment of the amount due him, by Richard Relf, executor, and authorized the cancellation of the portion of the mortgage held by him.

Richard Relf filed his account as executor, in which it appears that he applied the price of the sale to the Fortier's, to the payment of the mortgage granted by Daniel Clark to Stephen Henderson and I. E. Trask, on the 16th day of December, 1812.

The property came into the possession, as owner, of Minor Kenner, whose estate this appellant represents, by regular chain of conveyance from the vendees of Michel and Omer Fortier. The appellant, therefore, claims title derived from Richard Relf, executor of the will of Daniel Clark, of May 20th, 1811, under a sale made by him *under an order of the Probate*

Court, at public auction, within a year after his appointment, to pay the debts of the testator; and the price of which was actually applied to the payment of the purchase price of the property in dispute, due by Clark at the date of his death.

The appellee claims title to the property under a will of Daniel Clark, alleged to have been made on the 13th day of July, 1813, but not filed for probate until January 18th, 1855; and she claims that the sale made by Relf in 1813, was void. Judgment was given in her favor by the Circuit Court, awarding the property with rents and profits, and appellant has appealed.

The Pleadings.

A.—The bill of complainant is very prolix, and contains the names of a great number of defendants not before this Court. So far as it relates to appellant, it, in substance, alleges as follows:

1st. That Daniel Clark did on the 13th day of July, 1813, make his last will and testament, in which he acknowledged the complainant to be his only and legitimate child, and bequeathed her all his real and personal estate, subject to the payment of certain legacies and his just debts: that said will was filed in Court on the 18th day of January, 1855, but probate refused; that afterwards, on the 23d day of February, 1856, it was recognized and established by a decree of the Supreme Court of Louisiana: that the will of 1811 was revoked by the one of 1813: that the duties of Relf, as executor under the will of 1811, have expired,

and that Mary Clark, universal legatee named therein, is dead.

2d. That the defendant claims title through Relf and Chew, executors of the will of 1811; but she avers that they were not duly qualified executors of said will of 1811, at the time they pretended to have made sales of the property which was left by Daniel Clark, their term of office having expired previous to the date of such sales; that said executors did not observe the forms of law in making said sales; that they failed to make a true and faithful inventory of the estate, and to have an appraisement made according to law before the sales were made; that legal orders to sell were not obtained from the proper judge; that the sales were made by private contract, and not at public sale, with proper notice as required by law; that the price was insufficient; that all the acts of said executors in relation to said property were null and void on the face of the proceedings, and were known to defendants at the time they purchased said property; that the existence of the will of 1813, was well known to defendants at the time of their pretended purchase.

3d. That complainant only became of age on the 31st day of December, 1827; that she was kept in ignorance of her parentage, rights and name, until about the 18th day of June, 1834, at which date she brought suit for the purpose of proving said will of 1813, but that the suit was dismissed as of non-suit on the 18th day of June, 1836; that she instituted suit on the 28th day of July, 1836, in the District Court of the United States for the District of Louisiana, to enforce her rights under the will, against the defendant,

but that the suit was rejected; that the Supreme Court finally, in 1852, decided her claim as heir against her, and that she finally procured the probate of the will on the 23rd of February, 1856; that defendant was a party to the suit filed July 28, 1836, and answered; that she filed a bill in the Circuit Court against all the then owners of the said land on the 27th day of March, 1857, for the recovery of said land; that she brought a bill for the same purpose again May 1, 1857, and that process issued, but was not served, as she learned in 1865, for want of a deposit to pay costs; that she also brought a suit in the District Court of the Confederate States for the same purpose on the 1st day of April, 1861, in which process issued and was served; and she concludes by averring that she has been persistent in the prosecution of her rights, and prays a decree for the recovery of the land with rents and profits. R. p. 1 to 13.

B.—To this bill, the defendant filed several pleas, and an answer, all of which are to be considered together as one answer, by agreement of counsel. R. p. 52.

The substance of the pleas is set forth in the answer filed April 20, 1872, at page 19 of the Record, and in the amendment thereto at page 44.

The answer avers, 1st: That the will of Daniel Clark of 1811, was admitted to probate on the 17th of August, 1813, and that by said will he directed his just debts to be paid; that letters testamentary issued to Richard Relf as executor on the 27th day of August, 1813, in due form.

2d. That an order was granted by the Probate Court on the 27th of August, 1813, upon the petition of said executor, directing a sale of the real and personal estate of the late Daniel Clark, to be made according to law: that an inventory was begun by Thomas Beales, Register of Wills for the city and parish of Orleans, on the 28th of August, 1813, under the direction of the Probate Court, in which the plantation sued for was included as part of the estate of Daniel Clark: that the said Thomas Beales, Register of Wills, pursuant to said order, sold and adjudicated the plantation to Michel and Omer Fortier on the 8th day of November, 1813, for the sum of $120,000, $40,000 of which was made payable May 1, 1822, and the balance in six annual instalments, the first beginning March 1, 1815, all bearing six per cent interest, all of which appears from the report of sale made by the said Register of Wills annexed to the answer as exhibit B, R. page 27.

That the executor on the 11th day of November, 1813, executed an act of sale to Michel and Omer Fortier, pursuant to the adjudication made by the Register of Wills, on the 8th day of November 1813, in which act the sale was declared to have been made after "the publications and delays prescribed by law," on the terms set forth in *proces verbal* of sale made by Beales, Register of Wills; that said act of sale recited the existence of the mortgage of $120,000 placed upon the property in favor of Stephen Henderson by Daniel Clark on the 16th day of December, 1812, and the executor bound himself to discharge the same out of the price as it should be paid in by the Fortiers, which ap-

pears from the exhibit C. at R. page 32. (Here follows a list of the mesne conveyances through which the defendant derives title from the executor.)

3d. That defendant entered into possession of said plantation under said mesne conveyances, and held continuous, uninterrupted, peaceable and unequivocal possession thereof, until served with process in this cause January 3, 1866; that the said Michel and Omer Fortier, at the time they purchased said plantation on the 8th day of November, 1813, and all those through whom the defendant derives title subsequent to that date, had no knowledge, information or belief, of the making or existence of the last will of Daniel Clark, executed in 1813, as alleged by complainant; that the various persons (naming them) who subsequently became the owners of said plantation through the title derived from the sale made by Richard Relf, as executor to the said Fortiers, possessed the same in good faith and under a just title as owners; and that each and every of said owners had the right to acquire said property by prescription.

4th. Defendant denies that complainant became of age on the 31st day of December, 1827; but avers that she became of age June 4, 1825: denies that she was cited to answer the suit filed by complainant on the 1st day of May, 1857; denies that she had any knowledge of the bringing of the suit in the Confederate Court, on the 1st day of April, 1861, or that she was served with process therein; defendant admits that Minor Kenner, her deceased husband, was a party to the suit instituted by complainant in the Circuit Court of the United States, for the District of Louis-

iana, on the 28th day of July, 1836, but denies that the institution of said suit interrupted prescription then running against her: that said complainant in an amended and supplemental bill filed in said suit, November 28th, 1848, renounced for the purposes of that suit, all claims she had before made to the estate of Daniel Clark, as universal heir and devisee under the pretended will of 1813, and declared that she would, as against the defendants in said cause, assert and maintain her right to four-fifths of the property in dispute as forced heir of Daniel Clark, according to the laws of Louisiana; that such renunciation is an abandonment or voluntary discontinuance of her demand before made under the pretended will of 1813: that the suit so instituted on the 28th day of July, 1836, terminated by a definitive decree, in the Supreme Court of the United States in March, 1852; against the right of the complainant to any part of the estate of Daniel Clark, so that the interruption claimed to result from the bringing of said suit in 1836, must be considered as never having happened; and this defendant pleads said decree in bar of complainant's bill. (See amendment, p. 44.)

5th. Defendant pleads the prescription of ten, twenty and thirty years in bar of the demand of complainant.

(Here follows a history of the case of Joseph Fuentes vs. Myra Clark Gaines, but defendant does not now claim any benefit under the decree in that case.)

6th. Defendant avers that Daniel Clark paid no

portion of the price of the plantation and slaves purchased by him of Stephen Henderson; but bought the same for $120,000, on the following terms: $80,000 payable in installments of $20,000 each, falling due January 1, 1814–15--16–17, and $40,000 payable to Israel E. Trask, May, 2, 1822, all with six per cent. interest, which payments were represented by notes secured by mortgage and vendors' lien, retained in the act of sale passed before Lynd, notary, December 16, 1812: That Daniel Clark had not, at the time of his death, paid any part of the said purchase price: that the said purchase price so secured by mortgage, was paid and extinguished by Richard Relf, the executor of Daniel Clark, with the money realized from the sale of said plantation and slaves to said Michel and Omer Fortier and their vendees: and defendant avers that if complainant's title is superior to that of this defendant, she cannot be compelled to surrender the said plantation until said $120,000 so paid, is restored to her with interest. R. page 44.

7th. That all the proceedings in the premises at and prior to the said sale of said plantation by the Register of Wills on the 8th day of November, 1813, under authority of the said Probate Court for the parish of Orleans, were regularly had and taken, but she avers that if any informalities or irregularities attended said sale or the proceedings subsequent thereto to the order of the Probate Court for said sale, more than five years have elapsed since said sale before the exhibition of the complainant's bill herein, and she specially pleads the prescription of five years against all such

irregularities and informalities. See pleas and answer from page 13 to 27, and the amendnents thereto at page 44.

8th. Exceptions to the sufficiency of the answers were filed by complainant, but overruled. R. p. 43. Thereupon replication was filed and the cause proceeded on the bill, and the pleas and answer of defendant.

THE EVIDENCE FOR DEFENDANT

consists of the following documents, and the admissions of counsel:

1st. The will of Daniel Clark dated May 20, 1811, and the proof thereof, in which he constitutes his mother, Mary Clark, his universal legatee, after the payment of his just debts, and appoints Richard Relf and Beverly Chew his executors; and the record of the probate thereof, and appointment of Richard Relf as executor. R. p. 110, 111, 114.

2d. The inventory of the property of the estate of Daniel Clark, including the plantation in dispute, made Sept. 28, 1813. R. pp. 113.

3d. The petition of Richard Relf, executor, for authority to sell the plantation, and the order of court granting the same, dated August 27, 1813. R. p. 27.

4th. The *proces verbal* of the sale of the plantation to Michel and Omer Fortier on the 8th day of November, 1813, for $120,000, made by Thomas Beales, Register of Wills, under said order. R. p. 27.

5th. The transfer of the plantation made by Richard Relf, executor, to Michel and Omer Fortier, to carry out the sale made by the Register of Wills, as per act before Lafitte, Notary, November 11, 1813, in which

act it declares that the sale was made on the 8th "after the publications and delays prescribed by law," and in which the executor bound himself to apply the price as fast as paid in, to the extinguishment of the mortgage granted by Daniel Clark, on the 16th day of December, 1812, upon the property in favor of Stephen Henderson and I. E. Trask, and which then remained unpaid. R., p. 32.

6th. The act of sale from Stephen Henderson to Daniel Clark, dated December 16, 1812, in which Clark granted a mortgage of $120,000 in favor of his vendor and I. E. Trask, to secure the purchase price of the plantation. R., p. 45.

7th. The cancellation by Samuel Henderson of the mortgage granted in his favor by Daniel Clark, on the 16th day of December, 1812, and acknowledgment of payment from Relf, the executor. Act before Lynd, Notary, January 18, 1818. (R. p. 46.)

8th. Assignment by I. E. Trask, of his interest in the $120,000 mortgage of Daniel Clark, to Joseph Saul, and acknowledgment by the latter of payment of the $40,000 due him. R. pp. 47 and 48.

The account filed by Relf, executor, showing Daniel Clark's indebtedness to Stephen Henderson and I. E. Trask, and the application of the price of the property received from Michel and Omer Fortier, to its payment. R. p. 115.

10th. The agreement of the counsel for Mrs. Gaines admitting the chain of title set forth by defendant in her sworn answer, through which she claims ownership of the property, and admitting that the defendant in her own right and as administratrix of the estate of

Minor Kenner, and the said Minor Kenner, took public and unequivocal possession of the property under titles as owners, and which were continuous and uninterrupted by each vendee back to, but not including the sale made by Thomas Beales on the 8th day of November, 1813, to Michel and Omer Fortier, as set forth in defendant's answer. R. p. 51.

The Evidence for Complainant

Is confined to proof tending to establish her rights under the will of Daniel Clark of 1813. A list will be found at p. 54 of the record. It does not meet any of the averments of the answer, nor does it in the least refute the facts established by the defendant's proof.

The only question open for consideration is whether the facts alleged and fully proved by defendant, constitute a defense to the complainant's bill.

The appellant makes the following

Assignment of Errors.

1st. The Circuit Court erred in decreeing that the complainant is entitled to the property claimed and held by the respondent, as set forth in her answer, and in requiring her to surrender possession thereof to the complainant.

2d. The Circuit Court erred in decreeing that the respondent should account to the complainant, for the yearly rent and profits, and value for use accruing from said property since the same came into Minor Kenner's possession

3d. The Circuit Court erred in decreeing that the title of Michel and Omer Fortier, to the property in dispute acquired through the sale, made by Richard

Relf, sole executor of Daniel Clark, pursuant to the adjudication at public auction by the Register of Wills, within the year after Clark's death, and under authority of an order of the Probate Court, having jurisdiction of the succession, was not a good and valid title to said property, and that the mesne conveyances thereof through which respondent claims, are null and void.

4th. The Circuit Court erred in decreeing that Minor Kenner, and those through whom he derived title, purchased said property with notice that the sale thereof to Michel and Omer Fortier, was illegal, null and void.

5th. The Court erred in decreeing that said property still belongs to the succession of Daniel Clark, notwithstanding the sale thereof by the executor, under the order of the Probate Court.

6th. The Court erred in not maintaining the pleas of prescription interposed by the respondent.

7th. The Court erred in decreeing that the complainant should recover the property in dispute, without first paying respondent the amount of the purchase money derived from the sale thereof to Michel and Omer Fortier, andapplied to the payment of the debts of complainant's ancestor, bearing a mortgage thereon, together with interest from the date of its payment.

8th. The Court erred because it did not maintain respondent's pleas and answer, and dismiss complainant's bill.

1. *The sale by the executor vested a just title in Michel and Omer Fortier; or if there was any defect in it, it is cured by prescription.*

First. Article 3457 of the Civil Code of Louisiana declares that "*Prescription* is a manner of acquiring

"the ownership of property by the effect of time "under the conditions regulated by law."

This kind of ownership is acquired by mere possession.

Article 3475: "Immovables are prescribed for by "thirty years, without any title on the part of the "possessor, or whether he be in good faith or not."

Article 3478: "He who acquires an immovable in "good faith and by a just title prescribes for it in ten "years."

Possession in good faith under a title legal in form and sufficient to transfer the property gives title under the shorter period.

Articles 3484-5: "By the term just title in cases of "of prescription, we do not understand that which "the possesosr may derive from the *true* owner "* * but a title which the possessor may "have received from any person whom he honestly "believed to be the real owner; *provided*, the title were "such as to transfer the ownership of the property. "And in this case by the phrase *transfer the ownership*, "we understand not such title as shall really have "transferred the ownership of the property, but a title, "which by its nature would have been sufficient to "transfer the the ownership of property, provided "it had been derived from the real owner" * *

Other articles of the Code prescribe that the title must be valid in point of form, and that the possession shall have been continuous, uninterrupted, peaceable, public, and unequivocal, as owner.

Civil Code, articles 3486, 3487.

SECOND. The effect of the sale by the executor was

to vest a just title in Michel and Omer Fortier, under which they entered iuto public and unequivocal possession of said plantation, as owners, which possession continued in them and their vendees and the several successive purchasers thereof, down to and including this defendant, as set forth in her pleas and answers herein. See stipulation, R. p. 51.

The sale was made *within the year* following the death of Clark, and the granting of letters testamentary to Relf, as executor, and while his functions as executor were in full force.

In Gaines vs. Delacroix, 6 Wall. Rep., 719, the defendent contended that his titles derived from the purchase from Relf were valid, because he purchased within the year, while the functions of the executors were in full force.

The Court said: "This is true if he purchased in good faith and the requisites of the law on the subject of the sales of succession property were complied with."

The Delacroix case involved two purchases of slaves. One purchase was at private sale, and it was held, that he acquired no title. The other was at public auction, but the Court found that Delacroix had knowledge of the will of 1813, and its contents; and that he was appointed an executor therein; and that "he knew the will under the probate of which he was buying was not the true will of Daniel Clark." And therefore it was held, that he "got the property in bad faith."

The proceedings under which this defendant claims title, being in all things regular, as shown by the

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one, under the principles laid do
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The title of the Fortiers is one tı re
erty, and there is no defect upon the
defect existed *dehors* the instrument, there is no proof that they had notice thereof, and without such notice their good faith must be presumed.

Rivarde vs. Rousseau, 7 Ann., 3.

Carrel Heirs vs. Cabaret, 7 M., 406.

Good faith is always presumed until the contrary is shown.

Fletcher et al. vs. Cavalier et al. 4 L., 274.

Rivarde vs. Rousseau, 7 Ann., 3.

Packwood vs. Richardson, 1 N. S., 410.

The sale was made under the order of a competent Court at the instance of one apparently authorized to apply for it. The record shows that the executor was exercising the functions of his office when the order was asked for, as well as when the sale was made.

Said the Supreme Court in Green vs. Baptist Church, etc., 27 La. Ann. R., 563: "Purchasers are not bound, at their peril, to inquire when property is advertised for sale by an executor, whether anything has occurred outside of Court, to destroy the will under which he is acting."

So also in Duckworth vs. Vaughn, 27 A., 599, the Court said: "Purchasers in good faith need not look beyond the order of sale made by a Court having ju-

to vest a just title in Michel and Omer Fortier, under which they entered iuto public and unequivocal possession of said plantation, as owners, which possession continued in them and their vendees and the several successive purchasers thereof, down to and including this defendant, as set forth in her pleas and answers herein. See stipulation, R. p. 51.

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The proceedings under which this defendant claims title, being in all things regular, as shown by the

order, authorizing the sale and the proces-verbal thereof, and the act of sale, and there being no imputation of bad faith on the part of the purchasers at said sale, her title must be held to be a good and valid one, under the principles laid down in Gaines vs. Delacroix. See Fowler v. Zimmerman 1 Howell 119.

The title of the Fortiers is one translative of property, and there is no defect upon the face of it. If any defect existed *dehors* the instrument, there is no proof that they had notice thereof, and without such notice their good faith must be presumed.

Rivarde vs. Rousseau, 7 Ann., 3.

Carrel Heirs vs. Cabaret, 7 M., 406.

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So also in Duckworth vs. Vaughn, 27 A., 599, the Court said: "Purchasers in good faith need not look beyond the order of sale made by a Court having ju-

risdiction of the succession. They are not affected by antecedent irregularities. The jurisprudence on this point is settled."

See also McCullough vs. Minor, 2 A., 466.

Lallanne's Heirs vs. Moreau, 13 La., 434.

Shaffet vs. Jackson, 14 A., 157.

Howard vs. Zeyer, 18 A., 407.

Mitchell vs. Levi, 23 A., 630.

It is contended by complainant that the sale was not preceded by the advertisements required by law. The act recites that the sale was made "after the publications and delays prescribed by law." R. p. 32.

The account of the executor shows that he *paid for advertising the sale.* R. p. 115.

The law presumes the regularity of the proceedings subsequent to the order and preceding the sale. If this were not so upon principle, the Statute of March 10th 1834, established this presumption. Section 2 of said act is as follows:

"When a question shall arise out of any public sale heretofore made by the sheriff, auctioneer or other public officer, and which sale was required by law to be preceded by advertisements, the fact of sale being proved, it shall make *prima facie* evidence that the required advertisements were regularly made."

See Hewett vs. Stevens, 5 A. 640, where this statute was applied. This presumption has thus become a rule of property upon which the defendant may rely.

But the act of 1834 went further than this. Section 4 of said act is as follows:

"All informalities connected with or growing out of any public sale made by a sheriff, auctioneer or other public officer, shall after the lapse of five years from the time of making the same, be prescribed against by those claiming under such

sales, whether they be minors, married women or persons interdicted."

This statute has been frequently applied, but perhaps most pointedly in the following cases, viz:

Woods vs. Lee, et al., 21 A. 505.

In this case a want of the advertisements required by law was alleged, to which the prescription of five years was pleaded and maintained.

See also Pasiana vs. Powell, 21 A. 584, and the recent case of Pike vs. Evans, 94 U. S. Rep. 6, where the act of 1834 is considered by this Court, the authorities reviewed, and the statute applied.

This act, says the Supreme Court of Louisiana, in Fraser vs. Zylicz, 29 La. An. R 537, cures all nullities and irregularities growing out of public sales, and runs against minors, married women and persons interdicted.

The informalities, if any existed in this sale, were cured by five years, and possession for ten years under a title thus made perfect has clearly vested the property in the defendant by prescription.

In all the cases heretofore decided in this Court for Mrs. Gaines, except the Delacroix case, the defendants claimed title from Chew and Relf, under private sale made by them as agents of Mary Clark, devisee in the will of 1811, and in their pretended capacity as executors after their term of office had expired, and without any order of Court. Gaines vs. New Orleans, 6 Wallace, 711. And complainant knowing that her case depended upon it, expressly charges in her bill, that the sale of Relf, executor, to the Fortiers, was made after the expiration of the year of his appointment, and at a time when he had no authority to sell. But this is not

true, as the record shows that Relf was appointed executor on the 27th August, 1813, and made the sale on the 8th of November following, under an order of Court.

The rule laid down in the other cases, by which parties claiming title through later sales, are held to have possessed in bad faith and with notice of the executor's want of authority, has no application to this case.

But we submit that defendant's title is one derived from a succession being regularly administered by an executor for the benefit of the creditors and the heirs of Daniel Clark; and that the question of who was the legal heir, is wholly immaterial to its validity. It is perfect in form and substance, and needs no aid from the statutes of prescription.

2. *The application of the price of the property to the payment of the debt of Daniel Clark, which, as heir, she was bound to pay, works an estoppel against the complainant.*

The proof shows that the property claimed by complainant, was sold in the succession of Daniel Clark, for the same price he had purchased it for from Stephen Henderson the year before; and that the purchase money was applied to the extinguishment of the mortgage placed thereon in favor of the vendor to secure the price which remained wholly unpaid at Clark's death.

The property was sold to pay a debt resting upon it, to its full value, and the proceeds were applied to that purpose. Consequently the complainant has suf-

fered no injury of which she can complain in a court of equity.

In Woods vs. Lee, et al., 21 La. Ann., 505, the equitable rule of our jurisprudence in such cases is thus laid dowu by the Supreme Court, viz:

"*Bona fide* purchasers, who have paid their money upon the faith of judicial proceedings, and have remained in possession for years, are not to be turned out on account of mere informalities, at the instance of a party who shows no injury."

And the following cases sustain the text.

Barret vs. Emerson, et al., 8 A., 503.
Mullen, et al. vs. Harding, et al., 12 A., 271.
Stockton vs. Downey, 6 A., 585.
Jouet vs. Mortimer, 29 A., 206.

No rule is better settled than that a sale so made cannot be disturbed without returning the price of the adjudication.

The purchasers at the probate sale paid $120,000 for the property. Clark bought it in the preceding December, at the same price, but wholly upon credit. The whole sum was unpaid at the time of his death, and was secured by mortgage on the property. The debt and mortgage were paid and extinguished by the executor, or by the purchasers with the money paid by them as the price of the adjudication. This is proved by the notarial acts, acknowledgments and releases introduced in evidence by this defendant. (R. p. 46, *et seq.*) It also appears from the account of the executors, from which the following is an extract: (R. p. 115.)

"Debts in relation to the Cannes Brulé Estate:

No. 92. To Stephen Henderson, D. Clark's notes, given in payment of this estate	$80,000 00
Israel Trask, for amount of a mortgage held by him, assumed by D. Clark...	40,000 00
Interest due thereon.....	1,000 00
Interest paid Stephen Henderson on different payments of sale to Fortiers....	5,911 00
No. 93. Advertising sale.....	232 00"

In Davidson vs. Davidson, 28 La. Ann., 269, the Court said:

"Furthermore, we will remark that the sale could not be disturbed unless the heirs previously returned or offered to return the price of the adjudication, which has not been done."

Herein the Court only followed the settled jurisprudence upon this subject. Minors claiming restitution of property *in integram* must place matters *in statu quo*, and cannot recover the property in kind without refunding the price applied to their benefit, or to discharge a debt of their ancestor.

Daquin et al. vs. Coiron et al., 6 N. S. 684.
Daquin et al. vs. Coiron et al., 8 N. S. 623.
Andrews et al. vs. Ackerman, 8 N. S. 210.
Elliott vs. Labarre, 3 La. 541.
Davidson vs. Davidson, 28, A., 269.
Brown vs. Brown, 30 A., 174.
Green vs. Baptist Church, 27 A., 565.

The same rule has been frequently applied to other judicial sales. A *debtor* cannot recover his property,

though irregularly sold, until the price applied to the payment of his debt be refunded to the purchaser.

Donaldson vs. Rouzan, 8 M. 162. N.S. also p. 175

Dufour vs. Camfranc, 11 M. 615.

Stockton vs. Daunoy, 6 A. 581.

Gormley vs. Palms, 13 A. 213.

Taylor vs. Huey, 11 A. 614. 16 Mall 702.

Barrelli vs. Gauche, 24 A. 324.

In the last case the purchaser had discharged the prior mortgages resting upon the property purchased by him at sheriff's sale, and the plaintiff not having tendered him the amount so paid, his suit was dismissed.

The case is parallel to the case here presented, and the same rule must prevail.

The decree of the Circuit Court should be reversed, and a decree made dismissing complainant's bill of complaint against this respondent.

Respectfully submitted,

J. D. ROUSE,

Solicitor for Appellant.

January 8th, 1881.

Filed

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Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 218.

ELIZA DAVIS, WIDOW OF MINOR KENNER, DECEASED, APPELLANT,

versus

MYRA CLARK GAINES, APPELLEE.

BRIEF FOR APPELLEE.

Clark & Hofeline, Brief Printers, 112 Gravier Street

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BRIEF FOR APPELLEE.

Error of Facts stated in Brief of Appellant.

There is error in each of the statements; that the alleged sale of November 8, 1813, of the property claimed in this case, was a legal sale; that it was made under an order of Court; that it was preceded by a duly made inventory and appraisement, or any advertisement; that Thomas Beale, as register of wills, had any authority to make the said sale; that the subsequent notarial act of November 11, 1813, executed by Richard Relf, as executor, to Michel and Owen Fortier, either conveyed any title to said purchasers or was in accordance with said alleged adjudication, either as to conditions or recitals; or that the said Michel and Owen Fortier were purchasers of said property in good faith; or that said adjudication was made to pay the debts of Daniel Clark, or was required to be made for such purpose.

There is also error in the statements, that the alleged

will of Daniel Clark of May 10, 1811, was duly probated, or that by it said Richard Relf was given seizin of said Clark's estate. It is also specially denied, so far as, in any manner, it be alleged, on behalf of appellant, that said Richard Relf or Beverly Chew, at the time the instalments under said alleged adjudication of November 8, 1813, fell due, were any longer executors, even if, which is denied, they had previously been such under the said will of May 10, 1811; or that in any manner they were, at said dates, authorized to represent the estate of said Daniel Clark.

ARGUMENT.

The Supreme Court of the United States, in 1860, in Gaines vs. Hennen, 24 Howard, 615, adjudged:

"That under and by virtue, of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines, is the universal legatee of the said Daniel Clark, and as such entitled *to all the estate*, whether real or personal of which he, the said Daniel Clark *died possessed*, subject only to the payment of certain legacies therein named."

Since this decree was rendered several efforts have been made, as well in the Circuit Court, as in this Court, to reverse it.

In every case however, it has been reaffirmed. With certain exceptions, the defences now set up, are identical with those plead in the cases againt Hennen, 24 Howard, City of New Orleans et als., DeLizardi et als. and De la Croix, 6 Wallace, being mainly:

1. The plea of "purchaser in good faith for valuable consideration, and which consideration was applied to

the payment of the debts of the succession, either general or those secured by mortgage, on the property purchased, in favor of vendors.

2. Alleged title from Chew, and Relf, acting either as executors of Clark, or agents of his mother Mary Clark, universal legatee, under his alleged will of 1811.

3. The prescription of ten and thirty years.

4. The further defence plead, since the decision of the Supreme Court, in the cases of Gaines vs. New Orleans, and Gaines vs. Manl. de Lizardi, et als., *to-wit:* the suit of Fuentes et als. vs. Gaines, in the Second District Court, for the parish of Orleans, seeking the rescission of the probate of the will of 1813.

The exceptional defences, above referred to, are succinctly stated in the brief of solicitor for appellant before the Circuit Court, (substantially set forth in the brief filed in this Court), thus:

"The case of this defendant"—plaintiff in appeal—"differs from that of her co-defendants, in many impor-"tant particulars, some of which are the following:"

1. "Her title is derived through a sale made by Richard Relf, then sole qualified executor, under the will of 1811.

II. The property was included in the inventory of the succession, made by order of the Probate Court, Sept. 28th, 1813,

III. All the requirements of law were observed in making the sale,

1. It was made *by order of the Probate Court,*
2. At *public auction, by the Register of Wills,*
3. *Within the year* following Clark's death, to-wit: the 8th November, 1813, and
4. *After due advertisement.*

IV. The purchasers at the sale, were in good faith, and without notice of the will, under which complainant claims.

V. The whole price was applied to the payment of the debt of the succession, secured by mortgage upon the property, in favor of Daniel Clark's vendors or assignees.

I.

Considering *seriatim* the admitted *essential* requirements of law, for the validity of the alleged sale of Nov. 8, 1813, as set forth in paragraph 111, it is submitted:

I. IT WAS NOT MADE BY ORDER OF THE PROBATE COURT.

The order alleged in defendant's answer, p. 24, and referred to in her solicitor's brief, was that granted by the Probate Judge, on the 28th August, 1813, Record, p. 27

Admitting for the present that that order was a valid one, the question arises, was the "Tchoupitoulas" plantation and slaves, which formed the objects of the adjudication of the 8th November, embraced, or intended to be embraced, in that order? It is submitted, No: And for the reasons that the executor, having no legal right, could not have intended to ask the sale of property other than that which by an inventory should be shown to belong to the estate; nor the Judge, also having no legal right so to do, could be considered as intending to order the sale of property of which, in absence of an inventory, he had no description nor official knowledge that it belonged to the succession. Therefore the law is positive;

"*After* the inventory of said property shall have been completed, the parish judge, by whom the inventory shall have been made, shall cause all said movable and immovable property to be sold to the highest bidder." Code

1808, Title, Administration of Vacant Estates, p. 174, Art. 128.

"Within ten days *after* the conclusion of the inventory, it shall be the duty of the tutor to proceed to the sale of the movable and immovable property of his ward," Title The Administration of the Tutor, p. 58, Art. 56.

In the title of Testamentary Executors it is provided:

" When the testamentary executor has seizin of the property of the succession, and is directed to sell it, he must proceed to the sale in the manner prescribed to the curators of absent heirs," page 346, Art. 174.

Now, Relf on the 18th August, 1813, the day following the probate of the will of 1811, petitioned for and obtained an order for the removal of the seals and taking of an inventory. Record, page /// On that day the inventory was commenced by the Register of Wills, and two notes amounting to $4861 were inventoried, whereupon an adjournment was had to the next day. On that day there were inventoried the movables appraised at $4489.75; certain slaves appraised at $26,900, which in the *proces verbal* are declared to be all the slaves which were presented as belonging to the succession; land and buildings appraised at $10,000; whereupon there was an adjournment to the following day, the 20th August. On the 20th, notes and obligations to the amount of $80,678.46 were inventoried; the whole appraisement thus amounting to one hundred and twenty-three thousand nine hundred and twenty-nine dollars, ($123,929) when another adjournment was had. On the 23d, various documents, title papers, etc, were inventoried. On the 27th the in-

ventory of documents and titles was completed; and it was on this day, the 27th August, upon the filing of the inventory, that the executor petitioned the Judge "to grant him the necessary authorization that he might sell the movable and immovable property of the estate of the deceased," and on which petition the Judge endorsed the following order: "Let the sale take place as prayed for according to law." (p. 27.)

That the Register of Wills did not consider that the adjudication of the 8th November, was made under order of Court, is shown by the *proces verbal* of sale wherein the usual recital that the adjudication was made under an order of Court is omitted, while in the *proces verbal* of the same Register of Wills of the previous sale of the property inventoried before the order of sale, it is recited that the sale is made "in virtue of the order of the Honorable the Judge of the Court of Probates of the city and parish of the date of the 27th day of August last and after the advertisement prescribed by law." *Proces verbal* of sale of 12th Sept., 1813, Rec., p. 14 a 0 The language of the last portion of this *proces verbal* of 8th November, indicates that the sale was made regardless of order of Court, or even of an inventory. "Which being all the property *shown to me by the testamentary executor*, I have closed this *proces verbal*." R. p. 28

No formality—whether essential or not—in the return of an executive officer, entrusted with the execution of an order of Court, is so universally recognized and followed as a duty, as the recital of the order and the designation of Court issuing it. And the reason for this is forcibly

stated in one of the cases,—Stockton vs. Downey, 6 An., 584,—cited in the brief of appellant's solicitor.

Even in the confirmatory act of sale by the executor to the purchasers, before Lafitte, Notary, there is no recital that the adjudication had been made under an order of Court; a recital universally made by the notaries of this State in such confirmatory acts. See exhibit C, annexed to defendant's answer, p. 30

There thus having been no order of sale, which order the solicitor of defendant admits to be an essential element in an adjudication, it follows that the sale of the 8th November, 1813, did not transfer the title of the universal legatee of Daniel Clark to the alleged purchasers.

As said the Supreme Court of Louisiana, in the case of Elliot vs. Labarre, 2 L., 328:

" The conveyance derives its force and validity *entirely from the law*, and where the law is not followed the authority, *which stands in place of the owner's consent*, is wanting."

Referring to the jurisprudence ef Louisiana, the Supreme Court, in Gaines vs. New Orleans, said:

"Chief Justice Martin, in Donaldson vs. Hall, (Martin, N. S. 113,) says, a sale by executors *without an order of Court* and by private contract is void, and to the same effect is the case of Lanfere vs. Harper, (13 An. 548). The defendants having failed to prove that any order of Court was ever given to make these sales, they are nullities, and confer no title. And this is the decision in Paterson vs. Gaines, which is re-affirmed in Gaines vs. Hennen. It is useless to discuss the point further, as we see no reason to question the conclusion at which the Conrt arrived in those cases."

It is further submitted that another essential prerequi-

site of a judical sale was lacking in the alleged adjudication of the 8th November, 1813, *to-wit:*

A LEGAL INVENTORY AND APPRAISEMENT.

In complainant's bill it is specially averred.

"That a true and faithful inventory and just appraisement by two duly appointed and sworn appraisers of the real and personal estate of said Daniel Clark, had not been made according to law by said Relf and Chew before said sales were made." Bill of Complaint, p. 9

By the Code of 1808, p. 174, it is specially provided:

Art. 127. The said inventory must also contain an appraisement of the movable and immovable property of said estate, made by *two* appraisers, to be appointed by said parish judge.

That the provisions of this article are essential to an inventory, is recognized by a decision cited by defendant's solicitor, that of Lallanne's Heirs vs. Morian, 13 La. 434.

In the inventory taken under the order of Court of the 18th August, 1813, Sebastiau Blondeau and Prosper Prieur, acted as sworn appraisers. See the *proces verbaux*, Rec. p. 3, 4, ad

The proces verbal of the alleged inventory and appraisement of the Tchoupitoulas Plantation and slaves, of the 28th September, 1813. shows:

1. That the said Blondeau and Prieur did not act as appraisers, nor were they succeeded therein by others "appointed by the Parish Judge," but *chosen by the testamentary executor*, "Sicurs Baron Boisfontaine et Lille Sarpy, appréciateurs choisis par l'exécuteur testamentaire."

2. That even though it is declared in the commence-

ment of the *proces verbal* that *two* appraisers were chosen by this testamentary executor; yet, if the signatures of the parties to the *proces verbal* are correct, only *one* appraiser, Sarpy, acted as such. See close of *proces verbal*, p. 50. And to those conversant with the knowledge which the Baron had of the existence of the will of 1813, and his firm conviction as by whom it was suppressed, and from his inflexible integrity and firmness, standing almost the only witness on behalf of complainant during this long litigation unassailed, it could not seem strange that this devoted friend of Daniel Clark should refuse to be, *for any purpose*, "the chosen" of this testamentary executor.

It is further submitted that another essential pre-requisite of a judicial sale was lacking in the adjudication of the 8th November, 1813, *to wit*:

PREVIOUS ADVERTISEMENTS.

The pleadings of defendant specially allege, and those of the complainant deny such advertisment.

It is not pretended, in brief of defendant, that the record furnishes any *direct* proof thereof.

It is only claimed that there is a *presumption* of such advertisement arising from a recital, not in the proces verbal of sale, but in the confirmatory act of sale by the executor before Lafitte, Notary, that the sale was made "après la publication et délais prescrit par la loi," and from the additional fact that in an account filed by the executors on the 27th of August, 1838, there is found a charge for advertising the sale of the Cannes Bruslees,

(Tchoupitoulas) estate, $232. Record, p. 115 No. 93. Brief 18.

Such recitals in confirmatory acts of sale are not proof of such fact, as ruled in the case of Lanfear vs. Harper, 13 An. 548.

As to the charges in the executor's account of 1838, unsupported by vouchers, reference is simply drawn to the opinion of the Supreme Court, showing its worthlessness as evidence, in Gaines vs. Hennen, 24 Howard, pp. 570, 571.

Another presumption "that the required advertisements were made," is attempted to be drawn from the second section of the statute of March 10th 1834, and reference is made in defendant's brief to the case of Hewett vs. Stevens, 5 An. 640, as correctly interpreting this section. Brief, p. 18.

The language of the Court in that case is:

"The position of plaintiffs' counsel that when a sheriff's sale is attacked on the ground that the forms of law were not complied with, the onus is thrown on the party claiming under the sale to prove the requisite formalities must be *qualified*.

"*If he shows by the Sheriff's return* a substantial compliance with the requisites of law, it is incumbent on the plaintiff who attacks the sale to show that the forms were not strictly observed. And further what is necessarily or perhaps reasonably to be inferred from the sheriff's return may be persumed till the contrary is shown."

In the case thus quoted, the sheriff's return stated that the property *had been duly advertised*, but the *proces verbal* of adjudication of the 8th November, 1813, indicates no such advertisement. Record, pp. 27-28

To avoid the effect of this radical defect, defendant by

amended answer, and under the fourth section of said Act of March 10th. 1834, also pleads the prescription of five years against "all informalities connected with or growing out of said sale of said plant[illegible] November 8th, 1813." See amended [illegible]

To this plea it may be answered:

1. That, as shown by the case c[illegible] brief, Woods vs. Lee et al., 21 An. 505, as correctly interpreting this section, the absence of *advertisement* of property offered at a judicial sale is not a mere "informality" referred to in the section. For says the Court in this case of Woods vs. Lee:

"The property was sold at the sale so ordered *and advertised*, and to a party legally capable of purchasing. All *mere* irregularities and informalities in the execution of the decree or order of sale are cured by the above statute."

2. It will not be contended that this section is retroactive. Now in the bill of complainant filed in her suit against Chew and Relf, *et als.*, on 28th July, 1836, and wherein the first property claimed was that now claimed, it was specially denied, among other things,

"That said Relf and Chew, or either of them, as testamentary executors, when acting in said capacity did observe or comply with the *formalities*, or adopt the measures prescribed by law as requisite to give any validity or authority to any act or acts done, or assumed to be done by them in such assumed capacities of executors in relation to the said real and personal estate and slaves of Daniel Clark; * * * * and that all acts of said Richard Relf and Beverly Chew in relation to the estate of the said Daniel Clark, were upon the face of the proceedings in the foregoing and many other respects, illegal and informal, and fraudulent and void, by the laws of the

(Tchoupitoulas) estate, $232. Record, p. 115 No. 93, Brief 18.

Such recitals in confirmatory acts of sale are not proof of such fact, as ruled in the case of Lanfear vs. Harper, 13 An. 548.

As to the charges in the executor's account of 1838, unsupported by vouchers, reference is simply drawn to the opinion of the Supreme Court, showing its worthlessness as evidence, in Gaines vs. Hennen, 24 Howard, pp. 570, 571.

Another presumption "that the required advertisements were made," is attempted to be drawn from the second section of the statute of March 10th 1834, and reference is made in defendant's brief to the case of Hewett vs. Stevens, 5 An. 640, as correctly interpreting this section. Brief, p. 18.

The language of the Court in that case is:

"The position of plaintiffs' counsel that when a sheriff's sale is attacked on the ground that the forms of law were not complied with, the onus is thrown on the party claiming under the sale to prove the requisite formalities must be *qualified*.

"*If he shows by the Sheriff's return* a substantial compliance with the requisites of law, it is incumbent on the plaintiff who attacks the sale to show that the forms were not strictly observed. And further what is necessarily or perhaps reasonably to be inferred from the sheriff's return may be persumed till the contrary is shown."

In the case thus quoted, the sheriff's return stated that the property *had been duly advertised*, but the *proces verbal* of adjudication of the 8th November, 1813, indicates no such advertisement. Record, pp. 27-28

To avoid the effect of this radical defect, defendant by

amended answer, and under the fourth section of said Act of March 10th. 1834, also pleads the prescription of five years against "all informalities connected with or growing out of said sale of said plantation and slaves, on November 8th, 1813." See amended answer, pp. 44, 45-

To this plea it may be answered :

1. That, as shown by the case cited in defendant's brief, Woods vs. Lee et al., 21 An. 505, as correctly interpreting this section, the absence of *advertisement* of property offered at a judicial sale is not a mere "informality" referred to in the section. For says the Court in this case of Woods vs. Lee :

"The property was sold at the sale so ordered *and advertised*, and to a party legally capable of purchasing. All *mere* irregularities and informalities in the execution of the decree or order of sale are cured by the above statute."

2. It will not be contended that this section is retroactive. Now in the bill of complainant filed in her suit against Chew and Relf, *et als.*, on 28th July, 1836, and wherein the first property claimed was that now claimed, it was specially denied, among other things,

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land, and so they were necessarily known to be by the said purchasers at the said sales; and that the making, execution and existence of the said last will of the said Daniel Clark, made by him in 1813, and its fraudulent concealment, suppression and destruction at his death by Richard Relf, were notoriously known and reported at the time in Louisiana, and that the said purchasers on the occasion of making of the sales aforesaid, and afterwards, and their heirs and assigns, had some knowledge, notice, information, belief or suspicion, and did in their consciences believe or suspect, that the said Richard Relf and Beverly Chew had acted fraudulently, improperly and against equity and good conscience, in procuring to be admitted to probate the said will alleged to have been made by the said Daniel Clark in 1811, and in having procured the appointment of themselves by the Probate Court, as executors of the said will of 1811."

Hence, the essential averment in defendant's answer that the adjudication of the 8th November, 1813, was preceded by "due advertisement" is not supported either by direct or presumptive proof, nor the radical defect in the adjudication caused thereby, cured by the statute of 1834.

It is, therefore, submitted that the alleged essential distinction between the title of this defendant and those of her co-defendants, has no existence in fact.

It is not true that,

"All requirements of law were observed in making the sale," or that,

"It was made by order of the Probate Court, or after due legal inventory and appraisement," or

"After due advertisement."

On the contrary, the record shows that each of those essentials was lacking to the adjudication of the Tchoupitoulas plantation and slaves of the 8th November, 1813.

This should, it is submitted, end adversely to defendant the discussion as to the validity of her alleged title.

II.

Such, however, were the radical defects in the proceedings and the illegal acts of this executor, during "the year of his executorship," that even had the adjudication of the 8th November, 1813, not been radically defective for want of an order of sale, a legal inventory and appraisement, and due advertisement, yet it could not be held valid.

A. The record presents no evidence, *such as required by law*, that the alleged will of 20th May, 1811, was the will of Daniel Clark.

The defendant's title being based on such alleged will, she, in her answer, makes the essential allegation that "the said last will and testament had been duly proved according to the laws of the State." and her solicitor offers in evidence, from the Probate Record : "The will of Daniel Clark, dated May 20, 1811, and *the proof* thereof." See Brief, p. 11.

Among the various issues raised in this protracted litigation, none has been more strenuously persisted in by the various solicitors of the defendants than that regarding the *sacramental* character of the evidence required for the proof of an olographic will, by article 160, p. 244 of the code of 1808, which declares that :

"The olographic testament must be acknowledged and proved by the declaration or affirmation of two credible persons, who must attest that they recognize the testament as being entirely *written, dated and signed* in the testator's

handwriting, as having *often seen him write and sign during his lifetime.*"

So sacremental has this requirement of the law been held to be, that the defendants insisted that it was obligatory, even as proof of *lost* wills; and this was so held by Judge Lee, as Probate Judge, and by the Supreme Court, in Fuentes vs. Gaines, as to Clark's will of 1813. 25 An., p. 86.

Though the Supreme Court, Merrick, Chief Justice, in Succession of Clark, 11 An., 124, and the U. S. Supreme Court, in Gaines vs. Hennen, 24 Howard, as well as, later, this honorable Court recognized an exception to the rule in the case of lost wills; yet, as to *existing* wills, all agree that the proof required by Article 160 is *absolutely* essential and sacramental, and that without which proof no olographic testament *can have legal force or effect;* that it conveys no title to property. In truth, that, until so "acknowledged and proved," it remains as if not written.

The proof on which it is pretended the will of 20th May, 1811, was probated, is that stated in the *proces verbal* of the Judge:

"On the 17th August, 1813, appeared before me, James Pitot, Judge of the Probate Court for the City and Parish of New Orleans, Paul Lanusse and Louis Sere, who, being duly sworn, declare and say that a packet, folded up as a letter, sealed with a red wafer, which I presented to them, and bearing the following subscription: 'This is my olographic will. New Orleans, 20 May, 1810. Daniel Clark.' That the same is the *proper handwriting* of him, the said Daniel Clark.

"Whereupon, I, the said Judge, caused the said package to be broken open, in which was found one written page signed Daniel Clark, and after causing the said instrument

to be read in presence of the above named witnesses, who did further *recognize* the same to be totally written by the late Dan'l Clark."

Whereupon, the Judge proceeds to say :

"I do hereby declare that the said instrument *is duly proved*, ACCORDING TO THE LAWS OF THIS STATE, as being the last will and testament in scriptis of the late Daniel Clark."

How far this declaration of the Probate Judge, as to the written law of Louisiana, and the judgment of probate are to be recognized and held as *res adjudicata*, it is for the learned solicitor of defendant to state, and this Court to adjudge. Let this be as it may, the fact stands of record, and so will remain, that the declaration that the will was "duly proved according to the laws of Louisiana," was, on its face, false, and that the judgment of probate, was rendered in direct contravention to the written law. Further, as a consequence, *all and singular the acts and doings* of Relf and Chew, whether assuming to act as testamentary executors of Daniel Clark, or as agent of Mary Clark, the assumed universal legatee, were absolutely null and void, and must, to them, the said Relf and Chew, have been, at the time, so known; as, likewise, must legally be held to have been so known to all others, who, as purchasers, were bound to search the record of the succession for an order of sale.

B. THESE EXECUTORS HAD NOT, UNDER THE WILL OF 1811, SEIZIN OF THE ESTATE.

The Code of 1808, as the present Code, is explicit as to what language of the testator is required to bestow seizin.

Art. 167, p. 244 : The testator may express his inten-

tion to grant seizin of his estate to the testamentary executor, either in express terms, by authorizing him *to take possession judicially of the whole or a part of the estate of his succession after his death*, or by appointing him testamentary executor and *detainer* of his estate, the word detainer sufficiently announcing that the executor is to be seized of the property of the succession.

Art. 166: If the testator has not granted the seizin to the testamentary executor, the latter cannot require it.

The will of 1811 contains neither the words "authorizing him *to take possession*," nor "*detainer*." Its language simply is:

"I hereby nominate and appoint my friends Richard Relf and Beverly Chew my executors, with power to settle everything relative to my estate." R. p. 110

This is the interpretation of the distinguished lawyer who so long represented the executor, and of his partner, who, after the former's death, has continued the leading counsel opposed to complainant. As late as the 4th of March, 1857, after the will of 1811 had for long years been the subject of their legal consideration, as it had been of protracted judicial investigation, these learned counsel, in an action instituted by them in the Second District Court, to revoke the probate of the will of 1813, allege:

"Your petitioner avers that said Clark *gave no seizin* of the real estate and slaves owned by him at the period of his death, unto his said executors (Relf and Chew), but directed his debts to be paid, and devised, *without limitation, condition or restriction*, the whole of his estate, real, personal and mixed, wheresoever situated, unto his mother, Mary Clark." See petition of De la Croix, in D. L. Croix printed record, vol. 1, p. 65.

Such also was evidently the interpretation given to the

will by the executor Relf, as by the Probate Judge at the time letters of executorship were petitioned for and issued.

The petition did not claim seizin, but alleged only that the testator had "appointed him and Beverly Chew his testamentary executors, with power to *settle* everything relating to his estate."

The testamentary letters granted no seizin, but limited the executor's authority by the peculiar phraseology:

"The said Richard Relf has been, and is hereby authorized and empowered *to collect the goods and effects* which were of the said estate of the late Daniel Clark, deceased, and *to make a joint inventory thereof.* Prob. Rec., pp. 59. 60.

This was in strict accordance with the provision of the code of 1808, which clearly defined the powers of executors without seizin:

Art. 167, (p. 246). "His functions are *confined* to see to the *execution* of the legacies contained in the will, and to cause to be made the inventory and other *conservative* acts of the property of the succession."

The powers of these executors—assuming that such will had been proved—therefore, were, by law and the will, exclusively confined to taking of an inventory, the settlement—liquidation—of the testator's affairs and the preservation of the real and personal property for the universal legatee.

In like manner by the law and will these executors were positively and absolutely *prohibited* from invoking a sale of any portion of the estate. Under any circumstances —there being no special legacies of money—creditors alone had such right, and they only after exhaustion of

the movables and slaves, could demand sale of the real estate.

By the will and under the law, Mary Clark became the exclusive and absolute owner of her son's estate, and alone responsible for his debts. As such owner she alone had the right and power of its disposal. Without her consent or default, *on demand of creditors*, of her advancing the money to meet *their* demands, neither the executors nor the Judge had the power to provoke or order a sale. This is and ever has been the jurisprudence of Louisiana, to which there has never been recognized by her courts an exception. As said the solicitors who so long represented the various defendants,—in their petition in De la Croix vs. Gaines—regarding the universal legacy to Mary Clark:

"That by the effect and operation of the law in such cases made and provided, the whole of the estate of said deceased Daniel Clark, real, personal and mixed, became vested in said Mary Clark, *as absolute owner* to all intents and purposes, and that so soon as she manifested an intention not to renounce but to accept of the said succession to which she had succeeded, not only as heir at law, but as instituted heiress aforesaid, her acceptance in contemplation of law reverted back to the moment of the death of said Daniel Clark, her son, the testator aforesaid, *and the seizin of said property thus became absolute and perfected*. De la Croix printed record, vol. 1, 64.

And it was this right of an universal legatee that the Supreme Court recognized as belonging to this complainant when it declared "that under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such entitled to *all the estate*, whether real or personal, of which he, the said Daniel Cark, *died*

possessed, subject only to the payment of certain legacies therein named."

Nor would the provisions of the code of 1880, which, under the circumstances of the *heirs* being absent and *not represented* in the territory, authorized executors, even without seizin, to invoke a sale of property, authorize the sales made by these executors, especially the sale of the *8th of November, 1813*, because,

1st. That provision evidently did not apply to legatees either special or universal, to whom the testator bequeathed *directly* his *property*, and not its *price*.

2d. It has ever been the constant plea of said executors, as it has of most of the defenandts in these various suits, that said universal legatee *had*, as early as the *1st October, 1813*, manifested her intention to accept the legacy and *did select as her representatives* the said Richard Relf and Beverly Chew. [See tender of deposit before John Lynd, Notary, by Relf and Chew of an alleged power of attorney, of Myra Clark, of Oct. 1, 1813. Prob. Rec., pp. 71 .]

Hence, said Relf not being invested with seizin, the alleged adjudication of the 8th November, 1813, was made in violation of a *prohibitory* law, and therefore, for this reason, was absolutely null.

C. Let the acts of this executor be further followed.

Having on the same day, the 27th August, petitioned fo and obtained letters of executorship; petitioned for—without alleging reasons—and obtaining an order of sale, this executor petitioned for and obtained an order of Court :

"To mortgage or give in pledge all such of the properties and effects of the estate as *he* will think proper to obtain money to discharge the debts of the said estate," "in order to *avoid* the *sacrificing* the estate, by an immediate sale for cash, or *at terms of credit* so that it would be *impossible* to obtain a price proportionate to the value of the property," and which sales, he alleges, could not be made *without* sacrificing the property of the deceased, and the interest of the *creditors* as well as that of the heirs!" Probate record, pp. 58, 59.

Should this order not be held, as with much force it might, to *revoke* the previous order of sale, yet it is a judicial admission by this executor, that he knowingly asked of the Probate Judge and, *mirabile dictu*, with the consent of the person *appointed* but never *qualified* attorney of absent heirs, the power of sacrificing the interests of the creditors and universal legatee.

And more than this, it is a judicial admission that this power was exercised by the executor, when by sale on the *12th of September*, he left for the family of the testator not a single souvenir of all the choicest works of vertu, art and literature which filled his mansion, or of even the flora which beautified his grounds, and when on the 8th October, he caused the sale of over sixty slaves, and on the 8th November, the Tchoupitoulas plantation with over sixty slaves. Thus it is conclusive evidence of the verity of the averment in complainant's bill, that the properties of the estate were sold for less than their "full and valuable consideration."

D. Another provision of the Code of 1808, is:

Art. 129, (p. 174). If the Parish Judge by whom said sale is to be made, believes that said movable and immovable property comprised in the inventory, cannot be sold

for cash without materially injuring the interest of the parties, he shall have the power to grant such terms as he shall think proper for the payments, provided it be by the advice and with the consent of the heirs present, and *provided* also that such Judge shall require from the persons to whom such property may be adjudged, such security as shall assure the payment of the things sold, when the same shall become due.

Had the order of 27th August, embraced, as contended, the sale of the Tchoupitoulas plantation, its adjudication on the 8th November, would have been in violation of the above article in two essential particulars:

1st. It was on terms of credit—and long ones—and this without the authorization of the Judge.

2d. It required from the purchasers no security. Proces verbal of sale, probate record, pp. 55, 56.

True in a subsequent notarial act, from the executor to the purchasers, security was given; but that, if the *adjudication was valid*, was entirely voluntary, and if not valid, could not have been made so by subsequent acts of the parties.

A reasonable limit of a written argument will not admit of further examination of the acts of this executor during the year of his executorship.

These acts, which thus have been drawn to the attention of the Court, it is believed, establish that this executor's administration, in their regard, was as regardless of the trust assumed by him, as were his other acts which, extending through subsequent years, brought upon him the merited censure of the Courts of the country.

E. Nor do the numerous authorities cited by the learned solicitor of defendant warrant the assumption that

the sales, though illegal as to the executor, were legal as regards the purchasers.

Though it be true, as quoted from the case of Gaines vs. De la Croix, that his purchase within the year of the executorship was good, "if he purchased in good faith and the requisites of the law on the subject of the sales of succession property were complied with," yet, in the case at bar, to say nothing of good faith, the requisites of the law were not complied with.

There was no order for the sale of this property given, even if the order of 27 August were a sufficient order for sale of property at that date inventoried. There was no valid inventory and appraisement of this property. There was no advertisement of the sale.

Though it be true, as stated in the extract quoted from the opinion in Duckworth vs. Vaughn, 27 An., 599 - " Purchasers in good faith need not look beyond the order of sale made by a Court having jurisdiction of the succession. They are not affected by antecedent irregnlari: ties," yet they *must* look till they *find an order* of Court authorizing the sale of the property they propose to purchase, and containing the essential requisites of such orders.

It will scarcely be contended that finding the following:

"Let the sale take place as prayed for, according to law. Js. Pitot,

New Orleans, August 27, 1813. *Judge.*"

would meet the requisites of the decision. It, of itself, describes no property ordered to be sold, or the terms and

condition of its sale. It, hoewer, by its language, indicates that the sale ordered is one "prayed for," and being doubtless, endorsed on a petition, the desiring purchaser goes, and properly, though "beyond" the order, to the petition. This, *at least*, it is submitted he must have done to be protected by the ruling in the case cited. But the *petition* fails to give him necessary information. It does not describe the property thus ordered to be sold. True, it shows that it is "the movable and immovable property of the estate of the deceased," Daniel Clark. He knows, however, or is held in law to know, that the order, referring to property described in the petition, could only legally embrace, or have been intended to embrace, such property of the estate as, *at the date of the order*, had been inventoried, for, among other reasons, only such inventoried property could have been known judicially to the Court to belong to the estate Hence, again, from the imperfectness of the petition, as of the order, the desiring purchaser was compelled to go "beyond" even the petition, and seek an inventory of property of the estate previously taken. Finding that, it, with the petition, would make the order of sale complete, so far as determining the property intended to be and which legally was embraced in the order. And this he must have done to be protected by the ruling in the case cited And this done, he found the Court had issued an order for the sale of the property described in the inventory so previously taken. And this done, he, of course, found—*and therefore had knowledge*—that there was no order of Court for the sale of Tchoupitoulas plantation.

Another consequence flows from the necessity imposed on the desiring purchaser by the imperfectness of the order itself. The examination of the petition and inventory brought to him *knowledge* of even "antecedent *irregularities*," ignorance of which, *alone*, under the decisions, relieve the purchasers from *their* effect.

By the petition he saw that no reason was given for provoking the sale.

Moreover, if, as probable, he sought for an order of Conrt authorizing a sale of the "Tchoupitoulas" plantation and found the pretended inventory thereof, he obtained the personal knowledge, not only, again, that that plantation was not embraced in the order of 27th August, but that there had been no legal inventory and appraisement thereof, as heretofore shown; and no order by the Judge, who alone could grant it, that the plantation be sold on terms of credit A purchaser with such knowledge cannot be considered as in good faith, but must be held, as has so often been as regards the other defendants, a purchaser *mala fide*.

III.

Thus far the case has been considered on the assumed correctness of the proposition contended for in defendant's brief, that it would suffice to show that the purchasers at the sale of November 8, 1813, "purchased in good faith and the requisites of the law on the subject were complied with," *independent* of such title being completed by *prescription*. This position is attempted to be supported by the decision of the Supreme Court in Gaines vs. De la Croix, 6 Wallace.

The Court, by examining that decision, will see that instead of adjudging that point, it at the most refers to it *obiter*, and in another part of the opinion uses language showing it did not intend to adjudge the point.

The decision of the point was unnecessary, as the Court found from the record that De la Croix had *knowledge of the will of 1813*, and that knowledge *of itself* precluded him from acquiring anything at a succession sale, even though "the rnquisites of the law on the subject of the sales of succession property were complied with." Had De la Croix not such knowledge, and the prerequisite forms of law had been complied with, he would have been a purchaser "in good faith," "by a just title," and therefore could have acquired full ownership by the prescription—the property being slaves, though the complainant was an absentee—of ten years, and in this respect would have differed materially from the cases against Hennen, the City of New Orleans and De Lizardi, who were held to have purchased from the executors by private acts, and after the expiration of the executorship, and hence could not be considered as purchasers in good faith or entitled to such prescription.

But it is respectfully submitted, that even where all the forms of law have been complied with, and accompanied with good faith, a purchase under a revoked will does not, of itself, convey the fee to the property as against the true heir under a subsequent will. The universally recognized rule that the sale of the property of another is null, is applicable to sales under order of Court as to extra judicial sales.

In truth, this was recognized by the Supreme Court in Gaines vs. City of New Orleans, when the Court (6 Wallace, 716) said :

"In deciding the issue thus presented, the defence that although the sales were irregular, those who bought the property did it in good faith and without notice and are protected, cannot avail the defendants unless accompanied by the plea of prescription. As we have said in a previous part of this opinion, all that the law of Louisiana has done to protect one who has bought property in good faith, although it shall turn out the property belongs to another person, is to give him the benefit of the bar of time to prescribe.

If the plaintiff was endeavoring to establish an equitable title, this Court, if it saw proper to do so, could refuse to her the use of the peculiar powers of a Court of Chary ncein aiding to establish it against the purchaser of the legal estate who had acquired it fairly and hon estly. As she is not doing this, but is contesting her right to the estate, we cannot see how either in a court of law or equity she can lose that right because the defendants have purchased in good faith what they supposed was the legal title."

In support of this opinion the Court refers to the law of Louisiana as decided in the case of Balot T. Ripoli vs. Morena, 12 R. 552, the facts of which case, as stated in the concise language of a former solicitor of complainant, were :

Sebastian Ripoli died in New Orleans in 1836. He left by will to his universal legatee, Teresa Morena, his natural daughter, all his property. His will was duly probated, and Teresa Morena put in possession, *by order of the Court* of all his property as testamentary heir

Teresa sold a lot of land (part of the estate) to a *bona fide* purchaser. Some ten years after, two sisters of Ripoli brought suit against this last *bona fide* purchaser for the

land, claiming it as the heirs of Ripoli, and to set aside the will. The will was set aside. The defendant set up the defence that he was a *bona fide* purchaser from the apparent heir and universal legatee, and also that *there was a judgment of the Court* putting his vendor, Teresa Morena, in possession of this property as testamentary heir. The case raised this precise question. We give the language of the Court as to the question decided.

"Can those who have purchased property from Teresa Morena, who was the apparent heir or universal legatee of the deceased, and who had been put in possession as such, retain possession of the real estate against the claim of the real and actual heirs?" The Court decides that the *bona fide* purchaser from the testamentary or instituted heir took no title as against the title of the real or paramount heir. And they say:

....." Here, it is true, Teresa Morena, who had been *put in possession* of the estate, was the only apparent heir of the testator *under the decree of the Probate Court* ordering the will to be executed, and might have been, perhaps, fairly supposed to be the exclusive owner of the property purchased, but the purchasers might also have used due precaution to ascertain the extent of her rights.

....." But, be this as it may, it does not seem to us that the purchasers of the property in dispute can, under any circumstances, have acquired any greater right, or any better title to it than their vendor herself had."

....." We agree with Touillier, that all the law has done in favor of" (such) "a purchaser in good faith is to give him *the benefit of the prescription* of ten or twenty years."

With all deference, solicitor of Complainant fails to perceive how the title of Daniel Clark to his estate, conveyed, through his revoked will of 1811, to his universal legatee, and through her, by an order of sale "made by a Court having jurisdiction of the succession," invoked by an executor of that will, adjudicated to a third person,

became lost to Clark's real and paramount heir and legatee, *any more* than the title of Balot G. Ripoli, conveyed by a real and *existing* will to *his* universal legatee, recognized as "exclusive owner," by "an order made by the Court having (exclusive) jurisdiction of the succession," and by her, as owner, sold to a third person, was lost to Ripoli's real and paramount heirs.

In either case, the title to such third purchaser, though " he acquired the immovable in good faith and by a just title," and may become the owner through prescription, yet, until such prescription be acquired, must yield to the title of the heir, the real owner.

That the sale of another's property, even under an order of Court made in due form, and with all the requirements of law, gives to the purchaser only a title sufficient, in case of his good faith, *to have a title of prescription*, is shown by the ruling in the De la Croix case, for if the Probate Court *had full power to convey the absolute fee of the property* of Clark by public auction, for the purpose of obtaining means to pay the debts of his estate or any other purpose, it would have mattered not as to the knowledge or good faith of either De la Croix or any other of the respective bidders at the sale.

IV.

Thus far the question as to the validity of the adjudication of 8 November, 1813, has been considered irrespective of the purchaser's knowledge of the subsequent will of 1813.

Such knowledge the Supreme Court considered suffi-

cient to render null the title of De la Croix, even if, as he alleged, "he had purchased in good faith and the requisites of the law on the subjet of sales of succession property had been complied with." And in Ripoli vs. Morena, before referred to, the Supreme Court clearly intimated that when titles are derived from a testator through purchase from his universal legatee, it is the duty of prudence on the part of the purchaser to use due precaution to ascertain the rights actually acquired by the testament, because, in case of purchase, the title so acquired would be affected by any subsequently discovered defect in the legatee's title.

Though over sixty years have elapsed, yet such has proven the character of the wrongs done this complainant at the time and immediately following her father's death, that the necessary proof has remained to identify and, at last, thwart the wrong-doers.

As has been seen, the various acts of this executor, wherein, under the forms of judicial proceedings, he committed the spoliation of the estate, are shown to have been illegal by the record thereof still preserved. So those who, as purchasers, became participators in those illegal acts, have been, through the evidence thus preserved, invariably adjuged fraudulent possessors.

And of no fact is there more conclusive evidence in the record than that those who, during the year following the death of Daniel Clark, had any interest in either his memory or estate, had knowledge of the execution by him of a will subsequent in date to that of 1811, and of the fraud by which that will was suppressed.

Is it asked, what is the evidence thus preserved?

It consists of two kinds: One, the testimony of witnesses establishing that the existence of the subsequent will was personally known to several influential friends of Clark, and its suppression was the cause of their publicly expressed indignation, by which the fact became of public repute in the, then, small community: the other, the sworn statement made by one of these friends, who had been appointed by her father, his executor and the tutor of his child, filed in the record of his succession on the day following that of the pretended probate of the will of 1811, where it has ever remained as a warning of the fact, to all who either "looking for an order of sale" or for other purposes, examine that record.

Says one of those friends, Col. Bellechasse:

"On the next day, without receiving any message from Relf, I went and found Clark dead. I continued my way till I reached Pitot's, whom I found much affected by the death of Clark and very indignant at the conduct of Relf, as well for having always prevented the assistance of Clark's friends, for not having notified them, (particularly him, Pitot, who lived near Clark) of his approaching dissolution, that by their presence the fraudulent suppression of the last will of Clark might have been prevented. What, I said, has Clark's last will disappeared? Yes, my friend, it was not in the case in which he had placed it, and the succinct and provisional will of a dozen lines, which he previously made when about sailing for the North, which he delivered to Relf, has been brought forward by Relf. Pitot, as well as others, *always spoke with the utmost indignation* of the fraudulent suppression or destruction of the said last will of 1813, and the fraudulent substitution in its place of the provisional will of 1811, all of which was attributed to interested villainy." Tes. of Bellechasse, Record, p. 136

Says Baron Boisfontaine :

" When, after Mr. Clark's death, the disappearance of his last will *was the subject of conversation*, I related what Mr. Clark had told me about his last will in his last sickness; Judge Pitot and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Mr. Clark had told me about it; that when they read it, it was finished, was dated and signed by Mr. Clark; was an olographic will; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter, and bequeathed all his estate to her, gave an annuity to his mother, and legacies for some friends. The Chevalier de la Croix was tutor of his daughter Myra. Chevalier de la Croix, Colonel Bellechasse. Judge Pitot were executors Tes. of Boisfontaine, Probate R., p. 149. R. 128

Is it conceivable that under the circumstances above narrated, it should not have been of general repute and notoriety, that the will of 1811, was not the last will of Daniel Clark ?

Dusan de la Croix, on 18th August, 1818, the day following the filing of the alleged will of 1811, filed in the record of said succession a petition alleging, under oath, that he "has strong reasons to believe, and does verily believe, that the late Daniel Clark, has made a testament or codicil *posterior* to that which has been opened before your Honorable Court, and in the dispositions whereof he thinks to be interested." Rec. pp. 10, 11.

It is for this Court to decide whether, after so long a lapse of time, further evidence can be demanded of this complainant in support of that portion of her bill wherein she alleges knowledge by the purchasers under Chew and Relf, as to the revocation of the alleged will of 1811, by the execution of a subsequent one.

The evidence was sufficient however for this complainant, though commencing over twenty years after her father's death, to finally establish in 1856 to the satisfaction of the Supreme Court of this State, as subsequently of the U. S. Supreme Court, and still later of the Circuit Court, not only the execution by her father of such subsequent will, but its nature and contents, and fitting was that tribute of the Supreme Court, to her successful struggle for the truth, when it said : "To the discredit of friends of Daniel Clark, this child grows to womanhood in utter ignorance of her rights and parentage, and did not ascertain them until 1834, (then not fully,) since which time she has been endeavoring to obtain her rightful inheritance *Owing to the lapse of time*, it was difficult to reach the truth, and necessarily for many years she groped her way in darkness ; but finally she was able to show the great fraud perpetrated against her ; for, in the judgment of the Supreme Court of Louisiana, she established the validity of that very will which forty-three years before her father had executed in her favor."

If after such lapse of time such was still the public repute and remembrance of parties as to the aptly termed "great fraud," that it could be judicially established, by a stranger—for such complainant was on her return to her birth-place—it is submitted that the imagination must be stretched beyond the pale of human probability to conceive, that a person residing in the Parish of Orleans, in 1813, and, in the language of the Supreme Court, as to De la Croix, "under the circumstances attending the execution and disappearance of the will

of a man of the wealth and position of Daniel Clark," could remain unaware of the publicly expressed indignation of such prominent and influential persons as Judge Pitot, Bellechasse, Lynd, De la Croix and others; or that one desiring to purchase a large estate belonging to this succession, and searching the probate record "for an order of sale,"—which it is admitted he, at least, was bound to do—should not have observed the sworn declaration of De la Croix? What probably would be the verdict of an intelligent jury, made cognisant of all the circumstances and facts, still preserved in proof, upon an issue raised: *whether*, in all reasonable probability, the purchasers at the said adjudication of the 8th of November, 1813, had or had not heard of the fact of Daniel Clark having made and left a will, subsequent in date to the will of 1811? This question, should the case require it, this Court must determine.

In vain will defendant's solicitor search for authorities where "presumption of good faith" is held to exist against such adverse facts and rational presumptions as shown by this record. Certainly the cases, cited in his brief, fail in this regard.

The leading case quoted, (and which has so often been advanced, both in Circuit Court and this Supreme Court, though in vain, in behalf of the good faith, of the numerous co-defendants), is the case of Fletcher et al. vs. Cavalier et al. 4 L. 274.

The question there was simply whether:

"The reference to a title deposited in the office of *another* notary, is equal in law to a communication to the vendee

of that title, or, in other words, does it create such a presumption *juris et de jure*, of a knowledge of its contents, as that other proof of the fact is superfluous, and evidence cannot be received *against* it?"

The difference in the facts of the two cases is too plain to require comment.

From the means of knowledge, and the knowledge thus shown by the record, the purchasers at the sale of 8th Nov. 1813, must necessarily have had, as well of the various radical defects therein as of the suppression of the will of 1813, it is submitted that the plea of good faith has no more foundation in the case at bar than when heretofore plead by other defendants. In truth, if as contended by one of the several learned solicitors, the law of Louisiana recognized, as do some of the French authors, different *grades* of fraudulent possessors, the other defendants purchasing from Relf and Chew, subsequent to 1819, might be held as not so likely to be informed of their illegal acts and doings as were the Fortiers, who purchased while the acts of Relf formed the subject of public comment, excitement and indignation.

V. PRESCRIPTION.

The prescription plead is that of ten and thirty years. Appellant's brief. pp. 15. 16.

Formally, the law stood as to the shorter prescription.

"Immovables are prescribed for by ten years between persons present, and *twenty* years *between absentees*, when the possessor has been in *good faith*.

In 1848 the difference in favor of absentees was abolished. Revised Civil Code, Arts. 3474, 3478.

These prescriptions have been a standing plea of all the defendants since the suit 122, and has ever been rejected. 24 Howard, 553; 6 Wallace, 642.

The records of this Court show, and the opinions in regard thereto recognize the unceasing vigilance in which, for now near half a century, complainant has "in one form and another, pursued" her legal rights.

It is alleged in complainant's bill and proved in the record, that complainant was a minor (against whom prescription does not run, C. C., Art. 3,522) until Dec. 31, 1827, and that she was from early childhood an absentee. Hence, prescription, even of the shortest duration, would not have expired till 1847, which, of course, was interrupted in 1836, as likewise by subsequent suits.

VI.

The only remaining ground of defense referred to in defendant's brief is:

"That the sale cannot be disturbed without returning the price with interest, of adjudication," amounting to, on the 8th proximo, say, Principal, $120,000, Interest, $464,400.—Total, $584,500.

The alleged reason for this demand is, that a pre-existing mortgage debt due to Clark's vendor was "paid, and extinguished by the said executors of Daniel Clark, with the money realized from the sale of said plantation and slaves to the said M. and O. Fortier, and their vendees." (See amended answer, p. p. 51, brief, p. 6.)

In the case of De la Croix a similar, though in some respects a stronger defense, was ineffectually plead.

"That defendant further answering, says: That on the same day the said Relf, sole acting testamentary executor, and attorney in fact of the said Mary Clark, by authentic act, dated the *11th December, 1813*, and made before Marc Lafitte, a notary public of this city, sold, transferred and conveyed to him, the said defendant, the aforesaid slaves for the price of $21,000, part of which sum, to-wit: $13,400, said defendant, by the aforesaid act, assumed to pay, and afterwards did pay, on account of said succession, to Madame Hardy DeBois Blanc, in satisfaction and acquittance of a mortgage which Daniel Clark had executed in favor of the said Madame Blanc upon said slaves and others, and which subsisted in full force and virtue in law upon said slaves, when they came into possession and ownership of this defendant; the succession and heirs of said Clark being *thereby forever afterwards wholly acquitted and discharged from* all liability herein."

(See answer of De la Croix, printed record, vol: 1, pp. 21, 22; as also similar plea by city of New Orleans, Creppell and others, in answer N. O. record, vol. 1, pp. 23 *et seq.*)

A difference between the plea of De la Croix, and the one at bar, is that by the contract with the former, he, himself assumed the payment of the mortgage debt. Hence it could be held as the payment of that particular debt, while in the latter there was no such conditions in the terms of adjudication. The payment of the price, if made to Relf, was simply so much money paid to him, and whether Relf paid the mortgage to Clark's vendor out of his own funds, or those of the estate, the settlement for such payment became exclusively a matter between himself and the heirs of Clark, with which the purchasers at the sale of 8th November have no concern.

Their rights, if any, against complainant, are simply those arising from the paymens of certain monies to Relf, as the price of property belonging to the estate of Clark.

Now it is respectfully submitted, that whatever may be held regarding the validity of the adjudication of the plantation, there can be no question as to the effect of the payment of the price to Relf, for the *character of* THIS *act* has been determined by the various decisions heretofore rendered. Such payment was illegal, because made *after the expiration* of Relf's executorship, and *this* fact, these purchasers *must be held to have known*, as have, in all instances, the other defendants. Such payment, therefore, must be held as made *mala fide*, and for the return of which this complainant cannot be held responsible.

In Wallace, p. 523, Railroad Co. vs. Soutter,—the Court, Bradley, Justice, delivering the opinion—says:

"Was it ever known that a fraudulent purchaser of property, when deprived of its possession could recover his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have never been referred to it."

SUGDEN, on Vendors and Purchasers, ch. 16, p. 483.

"If a purchaser has notice of any claim or incumbrance, his conscience is affected, and a court of equity will then not only refuse to interfere in his favor, but will assist the claimant and incumbrancer in establishing his claim against him; his having given a consideration will not avail him; for as Lord Wicke observes, he throws away his money voluntarily, and of his own free will [see 3 Alk., 238, Fitz T., Subpœna, p. 2] and it may be laid down as a general rule, that a purchaser *with notice* is in equity bound to the same extent, and in the same manner as the person was of whom he purchased.'

3 Alkyns, p. 237 :

"If a person will purchase with notice of another's rights, his giving a consideration will not avail him, for he throws away his money voluntarily and of his own free will." See Master Sabourin's Report, pp. 35, 36.

But supposing these authorities, including the ruling of the Supreme Court in the cases of De la Croix and his co-defendants, should not be followed, but the position contended for by De la Croix, it is difficult to perceive what this defendant would take by this defense. The equitable rule, and one recognized by the Court in the case cited on the defendant's behalf, (Dufour vs Canfrae, 11 M. 615), that plaintiff can set off against the price to be returned the amount due by defendant, for rent or fruits and revenues, would compel Mrs. Kenner, if she claims the price which the purchasers at the adjudication of 8th November, 1813, or their vendees paid to the executors, to deduct therefrom the fruits and revenues derived as well by herself as the several vendors, back to and including the original purchasers, O. and M. Fortier, as well as the damages which complainant may have suffered by their illegal possession of her property for sixty years.

What the amount may be it is, of course, at this stage of the case impossible to state, it being a matter appertaining to the Master.

Respectfully submitted,

J. Whitaker

of Counsel

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14407 Question of removal from State Court

Not removable

Not noted next Saturday

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No 1010.

SAMUEL Y. HYDE, WILLIAM W. CARGILL, JAMES BASSITT, WILLIAM F. HUNTING, JOSEPH REYNOLDS, B. J. VAN VALKENBURG, AND HENRY ROWELL, PLAINTIFFS IN ERROR,

vs.

JOHN RUBLE AND JEROME P. GREEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 10, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1010.

SAMUEL Y. HYDE, WILLIAM W. CARGILL, JAMES BASSITT, WILLIAM F. HUNTING, JOSEPH REYNOLDS, B. J. VAN VALKENBURG, AND HENRY ROWELL, PLAINTIFFS IN ERROR,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the order remanding the action to the State court from which it was removed, before you, or some of you, between John Ruble and Jerome P. Green, plaintiffs, and Samuel Y. Hyde, William W. Cargill, James Bassitt, William F. Hunting, Joseph Reynolds, Bartholomew J. Van Valkenburg, and Henry Rowell, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America, for the District of Minnesota.

2 UNITED STATES OF AMERICA,
District of Minnesota, ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed marked Schedule A, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 4th day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

3 UNITED STATES OF AMERICA, *ss:*

To John Ruble and Jerome P. Green, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Minnesota, wherein John Ruble and Jerome P. Green are plaintiffs, and Samuel Y. Hyde, William W. Cargill, James Bassett, William F. Hunting, Joseph Reynolds, Bartholomew J. Van Valkenburg, and Henry Rowell are defendants, to show cause, if any there be, why the order remanding said cause to the State court should not be reversed and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of July, 1881.

R. R. NELSON, *Judge.*

4 (Endorsed:) C. 142. Law. Citation. Filed July 20, 1881. H. E. Mann, clerk.

Due and personal service of the within citation admitted this 11th day of August, A. D. 1881.

G. E. COLE,
Pl'ffs' Att'y.

SCHEDULE A REFERRED TO IN FOREGOING CERTIFICATE OF RETURN.

5 *Complaint.*

STATE OF MINNESOTA,
County of Freeborn:

District court, 10th judicial district.

JOHN RUBLE AND JEROME P. GREEN, PARTIES as Ruble and Green, plaintiffs,
against
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, Wm. F. Hunting, Joseph Reynolds, Henry Rowell, Bartholomew J. Van Valkenburg, defendants.

Now comes the above-named John Ruble and Jerome P. Green, plaintiffs in the above-entitled action, and complain in civil action against the defendants in the above-entitled action, and for cause respectfully state and show to the court:

First. That said plaintiffs now are, and during all the time hereinafter stated were, and ever since have been, partners doing business at Albert Lea, Minnesota, under the firm name of Ruble & Green.

Second. That during all the time hereinafter mentioned said defendants, Samuel Y. Hyde, William W. Cargill, James Bassett, Wm. F. Hunting, and Joseph Reynolds, were partners under the firm name of Hyde, Cargill & Co., and that said defendants in their said firm name, and said defendants Henry Rowell and Bartholomew J. Van Valkenburg, were partners in business at Albert Lea, Minnesota, but under
6 what name and style said plaintiffs have not any knowledge or information sufficient to form a belief; that the business of said defendants as such partners was the buying, shipping, and selling of grain, hides, and salt, at Albert Lea, Minnesota; and said business on

behalf of said defendants was conducted and carried on at said Albert Lea by said defendant Henry Rowell, and in the contract and management thereof said defendants had an elevator and warehouse at said Albert Lea, and in the usual and ordinary way of conducting and carrying on said business took and received in store at said Albert Lea grain to be stored there, and also took and received at said Albert Lea grain to be shipped to Milwaukee for storage there.

Third. That on or about the 1st day of January, 1876, said plaintiffs delivered to said defendants at Albert Lea aforesaid 345½ bushels of No. 2 wheat to be stored for said plaintiffs by said defendants in their warehouse; that said wheat was so delivered by said plaintiffs to said defendants and received by them under and in pursuance of a parole agreement then and there made and entered into by and between said plaintiffs and said defendants, in and by which for value said defendants agreed to receive said wheat and to store the same for said plaintiffs as long as they, said plaintiffs, should desire to store the same,
7 for the consideration of one cent a bushel a month for the time said wheat should be so stored, which said sum said plaintiffs agreed to pay; and that whenever said plaintiffs should desire to sell said wheat that said defendants should be the purchasers thereof and pay to said plaintiffs therefor the market price of wheat at Albert Lea, Minnesota.

Fourth. That on the 30th day of April, 1877, said plaintiffs notified said defendants that they desired to sell said wheat and demanded pay for the same, but said defendants refused to pay for the same or any part thereof, although they had long theretofore removed said wheat away from their said warehouse at Albert Lea, and shipped the same to Milwaukee or other distant markets, and have and did convert the same to their own use and did not then or ever thereafter, tender or offer to return the same or any part of the same to said plaintiffs.

Fifth. That on said 30th day of April, 1877, the market value of said wheat at Albert Lea aforesaid was one dollar and fifty-six and one-quarter cents (1.56¼) per bushel, and the total value of all said wheat so stored as aforesaid at said Albert Lea was five hundred thirty nine & $\frac{84}{100}$ dollars; that on the 13th day of April, 1876, said defendants advanced to said plaintiffs, in anticipation of the purchase of said
8 wheat under said agreement, the sum of $207.00; that the interest on the money so advanced from said date until the 30th day of April, 1877, at the rate of twelve per cent. per annum was the sum of $25.88 and no more; that the total value of storage of said wheat according to the terms of said contract from the time of delivering to the 30th day of April, 1877, was and is the sum of 55.00 and no more. That the said same of $207.00 so advanced and the interest aforesaid and the storage aforesaid are all the amounts ever at any time received by said plaintiffs on account of said wheat, and all the amounts chargeable against the same by said defendants on said 30th day of April, 1877, or at any other time; that on said 30th day of April, 1877, said wheat was worth at said Albert Lea two hundred fifty-one and $\frac{76}{100}$ dollars over and above all charges and claims of the defendants against the same.

II. Further complaining, and as a second and further cause of action against said defendants, said plaintiffs show to this court—

1st. That said plaintiffs are and during all the time hereinafter mentioned, were partners as aforesaid under the name and style aforesaid.

2nd. That at the several times hereinafter mentioned, said defendants were partners as hereinbefore stated.

9 3rd. That on or about the 30th day of December, 1875, said plaintiffs and said defendants entered into an agreement whereby said plaintiffs were to deliver to said defendants divers quantities of wheat for storage and said defendants agreed to receive said wheat from said defendants and to ship the same to Milwaukee and hold the same in store for them until they should order the same sold, and further agreed that when said plaintiffs should order the same sold they, said defendants, should pay said plaintiffs therefor the Milwaukee market price per bushel for the grade of wheat so delivered after deducting freights and commissions in Milwaukee, three cents for handling, and one cent per month for storage, and it was mutually agreed that all advances of money for freight or otherwise that should be made by said defendants to said plaintiffs should draw interest at the rate of twelve per cent. per annum.

4th. That in pursuance of said agreement said plaintiffs, at divers times delivered to said defendants divers amounts of No. 2 wheat as hereinafter stated; that is to say, on the 30th day of December, A. D. 1875, said plaintiffs delivered to said defendants three hundred twenty-four & $\frac{25}{60}$ bushels, and on the 4th day of January, 1876, said plaintiffs delivered to said defendants one hundred and two and $\frac{35}{60}$ bushels, amounting in all to four hundred and twenty-seven bushels of wheat, and said defendants, at said times, at Albert Lea, Freeborne County,
10 Minnesota, received said wheat from said plaintiffs under and in pursuance of said contract to be by them kept stored and disposed of according to the terms of said contract.

5th. On the 30th day of April, A. D. 1877, said plaintiff notified said defendants that they desired to sell said wheat, and ordered the same sold, and demanded of said defendants pay for the same according to the terms and pursuant to said contract, but said defendants neglected and refused to pay said plaintiffs for the same or any part thereof, and have ever since refused and still refuse to pay for the same.

6th. That the market price of No. two (2) wheat in Milwaukee on the 30th day of April, A. D. 1877, was one dollar eighty-one and one-quarter cents per bushel, and all of said wheat so stored was worth in the Milwaukee market on said day the sum of seven hundred seventy-two and $\frac{94}{100}$ dollars ($772.94).

7th. Said plaintiffs further aver and show to the court that at the time of the delivery of said wheat to said defendants the costs of freight and commission to and in Milwaukee did not exceed the sum of twenty-two (22) cents per bushel and the whole value of the freight and handling of all the wheat so delivered did not exceed the sum of ninety-three and $\frac{94}{100}$ dollars, and the interest thereon from the time of such delivery to the 30th day of April, 1877, did not exceed the
11 sum of fifteen and $\frac{05}{100}$ dollars, the handling of said wheat amounting to the sum of twelve and $\frac{81}{100}$ dollars and no more, the storage of said wheat from the 30th day of December, 1875, to the 30th day of April, 1877, did not exceed the value of sixteen cents per bushel and the total value and amount of said storage did not exceed the sum sixty-eight & $\frac{32}{100}$ dollars ($68.32); on the 13th day of April, 1876, said defendants advanced to said plaintiffs on the security of said wheat the sum of $93.00 and the interest thereon according to the terms of said agreement from the time it was so advanced to the 30th day of April, A. D. 1877, amounts to and does not exceed the sum of eleven and $\frac{68}{100}$ dollars; on or about the 24th day of March, A. D. 1877, said defendants at the request of said plaintiffs and as and for the advancement of money on account of storage of said wheat under said con-

tract, purchased for said plaintiffs to be shipped for them to one Henry Ruble, of McGregor, Iowa, about 260 bushels of seed wheat, for which they paid the sum of about one dollar a bushel, in all the sum of two hundred and sixty dollars and no more. That the interest thereon from the time of said purchase to the 30th day of April, A. D. 1877, amounts to and does not exceed the sum of three and $\frac{13}{100}$ dollars; that the foregoing are all the payments that have ever been made by said defendants to said plaintiffs for or on account of said wheat, and

12 all the charges either for cash advanced, interest, storage, handling, freight, or other thing, and the whole of said charges amount to and do not exceed the sum of five hundred and fifty-seven and $\frac{78}{100}$ dollars; and on said 30th day of April, 1877, said wheat was worth in the Milwaukee market over and above all of said matters, items, and offsets the sum of two hundred and fifteen and $\frac{16}{100}$ dollars. Wherefore said plaintiffs demand judgment against said defendants in the sum of four hundred and sixty-six & $\frac{92}{100}$ dollars with interest thereon from and after the 30th day of April, A. D. 1877, and the costs of this action.

Dated Albert Lea, Minnesota, March 6th, 1880.

JAMES H. PARKER,
Att'y for Plaintiffs.

STATE OF MINNESOTA,
County of Freeborne, ss:

Jerome P. Green, being duly sworn deposes and says that he is one of the plaintiffs in the above-entitled action; that he has heard read and knows the contents of the foregoing complaint subscribed by him and that the same is true, except as to those matters stated therein on information and belief, and as to these matters he believes it to be true.

JEROME P. GREEN.

Subscribed and sworn to before me this 6th day of March, A. D. 1880.

[SEAL.] J. H. PARKER,
Notary Public.

13 (Indorsed:) District court, Freeborne County, Minnesota. Ruble & Green vs. S. Y. Hyde, W. W. Cargill, et als. Complaint. Filed March 8, 1880. A. W. White, clerk. J. H. Parker, att'ys for plaintiff.

In the circuit court of the United States for the district of Minnesota.

STATE OF MINNESOTA,
County of Freeborne:

JOHN RUBLE AND JEROME P. GREEN, PARTners, as Ruble & Green, plaintiffs,
versus
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, Wm. F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholomew J. Van Valkenburg, defendants.

Now comes the above-named defendants, Samuel Y. Hyde, William W. Cargill, James Bassett, William F. Hunting, Joseph Reynolds, and

Bartholomew J. Van Valkenburg, and for their answer to the complaint of the plaintiffs in the above-entitled cause, allege:

First. That said defendants, Samuel Y. Hyde, William W. Cargill, and Bartholomew J. Van Valkenburg, are, and were at the time
14 said action was commenced, citizens of the State of Wisconsin, and residing therein; that said defendants, James Bassett, William F. Hunting, and Joseph Reynolds, are, and were at the time said action was commenced, citizens of the State of Iowa, and residing therein; and said defendant, Henry Rowell, at the time said action was commenced was a citizen of the State of Minnesota, and that said plaintiffs, John Ruble and Jerome P. Green, at the time said action was commenced, were citizens and residents of the State of Minnesota.

Second. Said defendants deny that at the time stated in said complaint, or at any time the defendants in said action were partners, as therein alleged or otherwise.

Third. They deny that at the time stated in said complaint, or at any time said plaintiffs delivered to them or either of them, or that they or either of them, received from said plaintiffs the number of bushels of wheat alleged in said complaint to have been delivered to said defendants by said plaintiffs, or any number of bushel*ls* whatever, either under the agreement set forth in said complaint, or under any agreement whatever, or that said defendants or either of them ever made the agreement set forth in said complaint.

15 Fourth. They deny that said plaintiffs, either at the time alleged in his said complaint or at any time, ordered or directed said defendants or either of them to sell the wheat mentioned in said complaint or any wheat whatever, either under the agreement set forth in said complaint or otherwise.

And, further answering herein, said defendants allege that as to whether the wheat mentioned in said complaint on the day mentioned therein was of the value stated therein, or any value, they have no knowledge or information thereof sufficient to form a belief, and therefore deny the same.

Further answering said complaint, said defendants deny each and every allegation, matter, and thing therein contained, and each and every part and portion thereof not hereinbefore explicitly denied, and deny that they or either of them are indebted to said plaintiffs or either of them in any sum whatever. Wherefore they ask that said action be dismissed and that they recover their cost; and disbursements herein.

Dated April 23rd, 1880.

LOVELY & MORGAN,
Defendants' Attorneys, Albert Lea, Minn.

16 STATE OF MINNESOTA,
County of Freeborne, ss:

D. F. Morgan came before me personally, and being first duly sworn, doth say that he is one of the defendants' attorneys in the above-entitled action; that the foregoing answer is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said defendants or one of them, is that they and all of them are absent from the county of Freeborne, Minnesota, where resides this affiant and their attorneys,

D. F. MORGAN.

Subscribed and sworn to before me, this 23' day of April, A. D. 1880.
[SEAL.] JOHN A. LOVELEY,
Notary Public, Minnesota.

(Indorsed:) State of Minnesota, county of Freeborn. District court 10th judicial district. Ruble & Green vs. S. Y. Hyde et als. Answer. Filed this 18th day of February, A. D. 1881. Geo. T. Gardner, clerk. Lovely & Morgan, defendants' attorneys.

17 STATE OF MINNESOTA,
County of Freeborn, ss:

In district court, 10th judicial district.

JOHN RUBLE AND JEROME P. GREENE, PARTners, as Ruble and Greene, plaintiffs,
vs.
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholomew J. Van Valkenberg, defendants.

Now comes the above-named defendant Henry Rowell, and for his separate answer to the complaint of the plaintiff in the above-entitled cause:

First. Denies each and every allegation, matter, and thing therein contained, and each and every part thereof not hereinafter admitted.

Second. Further answering said complaint said defendant admits that for himself and on his own account, as plaintiffs well knew, he did at certain times heretofore receive from said plaintiffs wheat to keep in store for them, but alleges that as to whether he received from said plaintiffs the number of bushels of wheat mentioned and set forth in said complaint, or whether the same was received at the times stated therein, he has no knowledge or information thereof sufficient to form a belief, and therefore he denies the same.

Third. Further answering, said defendant admits, that for himself and on his own account as aforesaid, he advanced to said plaintiffs the
18 sums of money stated in said complaint as having been received by them, but alleges that the same was the full value of said wheat and was received as the full value thereof at the time the same was so advanced, and was received by said plaintiffs in full payment and satisfaction of all claims and demands of every kind and character arising out of the storage of said wheat by said plaintiffs.

Fourth. He denies that at the time stated therein or at any time the plaintiffs therein named or either of them ever notified said defendants to sell said wheat or demanded their pay therefor as alleged in said complaint or otherwise; and he alleges that as to whether the market value of wheat at Albert Lea on the 30th day of April, 1877, was the sum of $1.56¼ per bushel as alleged in said complaint or any other sum whatever, he has no knowledge or information thereof sufficient to form a belief.

And said defendant further denies that he owes or is indebted to said plaintiffs or either of them in the sum of four hundred sixty-six and $\frac{92}{100}$ dollars as alleged in said complaint, or in any sum whatever.

Wherefore he demands that as to him said action be dismissed, and that he recover his costs herein.

Dated April 8, 1880.

LOVELY & MORGAN,
Atty's for H. Rowell.

STATE OF MINNESOTA,
County of Freeborn, ss:

Henry Rowell came before me personally, and being duly sworn, says that he is one of the defendants in the above-entitled action; that the foregoing separate answer of himself is true of his
19 own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that be believes it to be true.

H. ROWELL.

Subscribed and sworn to before me this 9th day of April, A. D. 1880.

[SEAL.] D. F. MORGAN,
Notary Public, Minn.

(Indorsed:) Filed July 7, 1880. H. E. Mann, clerk.

20 STATE OF MINNESOTA,
County of Freeborn:

In district court.

JOHN RUBLE AND JEROME P. GREEN, PARTners, as Ruble & Green, plaintiffs,
versus
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholomew J. Van Valkenburg, defendants.

To the Hon. John Q. Farmer, the judge of said court:

Your petitioners, Samuel Y. Hyde, William W. Cargill, James Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, & Bartholomew Van Valkenburg, the defendants, in the above-entitled action, respectively show that said Samuel Y. Hyde, William W. Cargill, Bartholomew J. Van Valkenburg, are and were at the time this action was commenced, citizens of the State of Wisconsin; that said James Bassett, William F. Hunting, and Joseph Reynolds, are and were at the time this action was commenced, citizens of the State of Iowa; and said Henry Rowell is and was when this action was commenced, a citizen of the State of Minnesota; that the plaintiffs, John Ruble and Jerome P. Green, are and were when this action was commenced, citizens of the State of Minnesota; that the above action was commenced
21 on the 23rd day of February, A. D. 1880, by the service of a summons in the county of Freeborn aforesaid; that this action is brought as will more fully appear by reference to the complaint, to enforce and collect an alleged indebtedness claimed to be due from the defendants jointly as copartners to the plaintiffs, the alleged claim arising out of certain wheat stored by the plaintiffs with the defendants Henry Rowell, at Albert Lea, Minnesota, for which said Henry Rowell became responsible as the factor of the plaintiffs.

It is claimed by the plaintiffs that said wheat was converted contrary to the duly of such bailee or factor, and this action is brought to recover damages for said conversion and breach of duty. It is alleged and claimed in this action that the other defendants were copartners with said Henry Rowell in his wheat business, and are liable for such conversion and breach of duty as such copartners. The defendants

other than said Henry Rowell claim as one of their main grounds of defense that they were not copartners of said Henry Rowell, and are not liable jointly with him or at all; and that they are not in any manner guilty of said conversion; the said matters will all more fully appear by reference to the complaint and answer on file, to which reference is hereby had.

22 That the matters in dispute exceeds the sum of five hundred dollars and amounts to the sum of four hundred sixty-six $\frac{92}{100}$ dollars, with interest thereon since the 30th day of April, 1877, which sum at the date of this petition is five hundred fifty-four $\frac{97}{100}$ dollars, exclusive of costs, and that the term of this court commencing on the 13th day of April, A. D. 1880, is the term at which this action could be first tried and that the trial thereof has not yet been had or commenced.

Your petitioners herewith present a bond, with good and sufficient security, for the defendants entering at the next term of the circuit court of the United States for the district of Minnesota, on the first day of the next session, a copy of the record in the above-entitled cause and for paying all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto and also for their appearing and entering special bail in such action if special bail was originally requested therein. Wherefore your petitioners pray the court to accept this petition and said bond to proceed no further in this action, pursuant to the acts of Congress in this behalf.

(Signed) SAMUEL Y. HYDE,
WILLIAM W. CARGILL.
23 JAMES P. BASSETT.
WILLIAM F. HUNTING.
BARTHOLOMEW J. VAN VALKENBURG,
By WILLIAM W. CARGILL.
JAMES P. BASSETT.
WILLIAM F. HUNTING AND
BARTHOLOMEW J. VAN VALKENBURG.
JOSEPH REYNOLDS.
HENRY ROWELL.

Subscribed & signed & sworn to before me this 29th day of March, A. D. 1880.

[SEAL.] OSCAR P. EMPREY,
Justice of Peace,
County.

Subscribed and sworn to before me by Samuel Y. Hyde, this 1st day of April, 1880.

[SEAL.] C. W. BUNN,
Notary Public, La Crosse Co., Wis.

Subscribed and sworn to before me by Joseph Reynolds this 2d day of April, 1880.

[SEAL.] W. C. HERPWIT,
Notary Public, Chicago, Cook Co., Ill.

Subscribed and sworn to before me by Henry Rowell, this 12th day of April, 1880.

[SEAL.] JACOB LARSON,
Notary Public, Minn.

(Indorsed:) District court, Freeborn County. John Ruble et als. vs.

S. Y. Hyde et als. Petition to remove cause to U. S. court. Filed April 12, 1880. A. W. White, clerk.

24 STATE OF MINNESOTA,
Freeborn County:

In district court.

JOHN RUBLE AND JEROME P. GREEN, PARTners, as Ruble & Green, plaintiffs,
vs.
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholomew J. Van Valkenburg, defendants.

Know all men by these presents that we, Samuel Y. Hyde and William W. Cargill, of La Crosse, in the county of La Crosse, State of Wisconsin, as principals and W. P. Sergeant & D. N. Gates of Albert Lea, county of Freeborn, State of Minnesota, as sureties, are held and firmly bound unto the plaintiffs, John Ruble and Jerome P. Green, in the above-entitled action, in the penal sum of five hundred dollars, lawful money of the United States, to be paid to the said John Ruble and Jerome P. Green, their heirs, administrators, executors, or assigns, by ourselves, our heirs, administrators, executors, or assigns, on demand. Witness our hand and seals this 11th day of January, A. D. 1881.

The condition of this bond is such that whereas the defendants above named, Samuel Y. Hyde, William W. Cargill, James Bas-
25 sett, William F. Hunting, Joseph Reynolds, and Bartholomew J. Van Valkenburg, are about to file a petition to remove the action above entitled, so far as concerns said petitioners, into the circuit court of the United States for the district of Minnesota:

Now, therefore, if said petitioners shall enter in such circuit court on the first day of its session copies of all process, pleadings, deposition, testimony, and other proceedings in the cause concerning or affecting the petitioners, and if they shall then appear and enter special bail in the cause, if special bail was originally requested therein, and if they shall pay all costs which may be awarded by the said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, then this bond is to be void; otherwise in full force.

WILLIAM W. CARGILL. [SEAL.]
SAMUEL Y. HYDE. [SEAL.]
W. P. SERGEANT. [SEAL.]
D. N. GATES. [SEAL.]

26 STATE OF MINNESOTA,
County of Freeborn, ss:

W. P. Sergeant and D. N. Gates, being duly sworn, each for himself deposes and says that he is one of the sureties on the foregoing bond; that he is a freeholder and resident at Albert Lea, in Freeborn County, State of Minnesota; that he is worth the sum of five hundred dollars in property in this State not exempt from execution and over and above all his debts and liabilities.

W. P. SERGEANT.
D. N. GATES.

Subscribed and sworn to before me this day of January, 1881.
[NOTARIAL SEAL.]
D. F. MORGAN,
Notary Public, Minn.

27 STATE OF MINNESOTA,
County of Freeborn:

I, A. W. White, clerk of the district court in and for the county of Freeborn, in the State of Minnesota, do hereby certify that I have compared the foregoing with the original papers in the foregoing entitled action remaining on file in my office, and that the same is a true and perfect transcript of said original.

In testimony whereof, witness my hand and the seal of said court, at Albert Lea, in said county, this 28th day of June, 1880.

[SEAL OF COURT.] A. W. WHITE, *Clerk.*

The return from the district court of Freeborn Co. did not contain the foregoing answers; they are put there to preserve a logical order. There is in the return not included herein an affidavit for publication of summons, which, as the parties appeared, was not deemed necessary by appellants' attorneys.

Return from State court, filed in U. S. circuit court, dist. of Minnesota, June 30, 1880.

28 United States circuit court for the district of Minnesota.

Term minutes, June term A. D. 1880.—*July* 31, 1880.

JOHN RUBLE ET AL.
vs.
SAMUEL Y. HYDE ET AL.

A motion having been heretofore made on the part of the plaintiffs in this action for an order remanding the same to the State court from which it was removed to this court, and such motion having been argued by the counsel for the respective parties, and submitted and taken under advisement: Now, the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, and that this action be, and the same is hereby, remanded to the district court for the county of Freeborn, Minnesota, from which it was removed to this court.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, H. E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby certify that I have carefully compared the foregoing copy with the original thereof which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, the 9th day of August, A. D. 1880.

[SEAL OF U. S. CIR'T C'T, DIS'T MINN.] H. E. MANN, *Clerk.*

(Indorsed: Order remanding cause to district court, Freeborn County. Filed August 11, 1880. A. W. White, clerk, by H. Blackman, deputy.

29 U. S. circuit court, Minn. dist., June T. 1880.

JOHN RUBLE ET AL.
vs.
S. Y. HYDE ET AL.

J. H. Parker & Jordon E. Cole, for plaintiffs.
Lovely & Morgan and Cameron, Lasey & Bunn, for defendants.

NELSON, *J.*

A motion is made to remand this suit which is removed from the State court, on the petition of the defendants, under the provisions of the 2nd section of the act of March 3, 1875. The following is the clause under which the suit was removed:

"That any suit of a civil nature, at law or in equity, now pending * * * in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different States, * * * eitherparty may remove said suit into the circuit court of the United States for the proper district."

This suit was brought by plaintiffs, a firm doing business in, and citizens of, the State of Minnesota, against seven defendants, three of them citizens of the State of Wisconsin, two citizens of the State of Iowa, and one, Henry Rowell, a citizen of Minnesota. The citi-
30 zenship of one defendant, Hunting, is not given in the petition, but it appears by an affidavit in the record that he is not a citizen of the State of Minnesota.

The plaintiffs seek to recover an alleged indebtedness due from the defendants jointly as copartners.

To sustain this cause they must prove a partnership between all of the defendants, which is denied by those not citizens of the same State with the plaintiffs, and also by Rowell, the defendant, who is a citizen of the same State.

Rowell is not a nominal party to this suit, and being a citizen of the same State with the plaintiffs, the controversy about which the suit was instituted in the State court, is not between citizens of one or more States on one side and citizens of other States on the other side.

In order that a suit may be removed by either party, under the provisions of section 2, in the act of 1875, above quoted, all the persons forming the party on one side of the controversy must be citizens of States different from those of which the other party are citizens.

In other words, as I understand the act of 1875, the change made by the clause is that the parties to the controversy, without reference to their position in the pleadings as plaintiffs or defendants, may be arranged on opposite sides; and if on one side each individual is a citizen of a different State from those of which the individuals on the other side are citizens, then the suit may be removed. Such is not the case here. See Burke v. Flood, 1 Fed. Rep., 541; Myer v. Delaware R. R. Construction Co., October term, 1879, U. S. Sup. C't; 12 Chicago Legal News, 135.

It is not necessary to consider the other point raised on the argument.

Motion granted.

31 STATE OF MINNESOTA,
County of Freeborn:

In district court.

JOHN RUBLE AND JEROME P. GREEN, PARTNERS as Ruble & Green, plaintiffs,
versus
SAMUEL Y. HYDE, WILLIAM W. CARGILL, JAMES Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholonew J. Van Valkenburg, defendants.

Know all men by these presents that we, Samuel Y. Hyde and William W. Cargill, as principals, and W. P. Sergeant & D. N. Gates, as sureties, which sureties reside in Freeborn County, in the State of Minnesota, are held and firmly bound unto John Ruble and Jerome P. Green, the plaintiffs in the above action, in the penal sum of one thousand dollars, to be paid to them, their heirs, administrators, executors, or assigns, in lawful money of the United States.

32 The condition of this obligation is such that whereas the above-entitled action has been commenced, and is now pending in the district court for Freeborn County, and the said defendants are about to file a petition to remove said action to the circuit court of the United States, for the district of Minnesota:

Now if the said defendants shall enter in the said circuit court on the first day of its next session, a copy of the record in this suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall there appear and enter special bail in said suit if special bail was originally requ'site therein, this bond shall be void; otherwise in full force and effect.

Witness our hands & seal this 10th day of April, 1880.

SAMUEL Y. HYDE. [SEAL.]
WILLIAM W. CARGILL. [SEAL.]
W. P. SERGEANT. [SEAL.]
D. N. GATES. [SEAL.]

STATE OF MINNESOTA,
County of Freeborn, ss:

W. P. Sergeant & D. N. Gates, came before me, and being each duly sworn says, that he is worth the sum of *of* one thousand dollars in property within this State, not execution and over and above all his debts; that he is a surety on the foregoing bond, and resides, and is a freeholder in Freeborn County in this State.

33 W. P. SERGEANT.
D. N. GATES.

Subscribed and sworn to before me this 10th day of April, A. D. 1880.

[NOTARIAL SEAL.] JACOB LARSON,
Notary Public, Maine.

(Indorsed:) District court, Freeborn County. John Ruble et al. vs. S. Y. Hyde et al. Bond. Filed this April 12th, 1880. A. W. White, clerk.

The within bond and sureties are hereby approved.

Dated April 14, 1880.

JOHN Q. FARMER,
Judge of said Court.

34 STATE OF MINNESOTA,
County of Freeborn:

In district court.

JOHN RUBLE AND JEROME P. GREEN, PARTners, as Ruble & Green, plaintiffs,
against
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholomew J. Van Valkenberg, defendants.

Your petitioners, Samuel Y. Hyde, William W. Cargill, James Bassett, William F. Hunting, Joseph Reynolds, and Bartholomew J. Van-Valkenberg, respectfully represent that the plaintiffs, John Ruble and Jerome P. Green, are and were, when this action was commenced, citizens of the State of Minnesota, and your petitioners are and were, when the action was commenced, respectively, citizens, Samuel Y. Hyde, William W. Cargill, and Bartholomew J. Van Valkenberg, of the State of Wisconsin, James Bassett, William F. Hunting, and Joseph Reynolds, of the State of Iowa, and that the defendant Henry Rowell is and was, when the action was commenced, a citizen of the State of Minnesota.

That the amount in dispute in this action exceeds the sum and
35 value of five hundred dollars, besides costs; that the trial or final hearing of this cause has not yet been had or commenced.

That the action is brought by the plaintiffs, John Ruble & Jerome Green, against all the defendants, alleging that the defendants are all copartners, and as such liable for the conversion of certain wheat, all of which appears more fully by the complaint; that the petitioners aforesaid, as a defense to said action, deny any copartnership with the defendant, Henry Rowell, as well as deny the conversion of such wheat as alleged, and one of the most vital controversies in such action is whether or not such copartnership in fact existed.

That this action is a suit in which there can be a final determination of the controversy, so far as concerns your petitioners, without the presence of the defendant, Henry Rowell, as a party to the cause.

Your petitioners herewith file and present a bond, with good and sufficient surety, for their entering in the circuit court of the United States for the district of Minnesota, on the first day of the next session, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting your petitioners, and also for their appearing and entering special bail in this cause, if special bail was originally requ'sit' thereon.

36 Your petitioners therefore pray that said surety be accepted, and that this cause proceed no further in this court as against your petitioners, and that this cause be removed as against your petitioners into the circuit court of the United States for the district of Minnesota.

LOVELY AND MORGAN, AND
CAMERON, LOSEY AND BUNN,
Attorneys for Petitioners.

(Indorsed:) In district court, Freeborn County. John Ruble et al. vs. S. Y. Hyde et als. Petition and bond for removal under act of 1866.

Lovely & Morgan, Cameron, Losey & Bunn, att'ys. Filed July 11, 1881. G. C. Gardner, clerk, by A. W. White, deputy.

Surety accepted & bond approved.

JOHN Q. PARMER, *Judge.*

37 In district court, county of Freeborn.

JOHN RUBLE AND JEROME P. GREEN
against
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, William F. Hunting, Henry Rowell, & Bartholomew J. Van Valkenburg.

At a general term of this court, held in Albert Lea, in said county, on the 10th day of January, A.D. 1881, on the second day of said term, to wit, on the 12th day of January, A. D. 1881, on motion of Lovlly & Morgan, the attorneys of the defendants, Samuel Y. Hyde, William W. Cargill, James Bassett, William F. Hunting, and Bartholomew J. Van Valkenburg, and on petition of said last-named defendants, and the cause existing therefor, and proper bond and surety having been offered and accepted—

It is ordered that this suit be removed into the circuit court of the United States for the district of Minnesota, so far as concerns the said defendants petitioning, leaving the cause to proceed in this court as to the defendant Henry Rowell.

By the court.

JOHN Q. PARMER, *Judge.*

Dated JANUARY 12TH, 1881.

38 (Indorsed:) State of Minnesota, county of Freeborn. District court. John Ruble and Jerome P. Green vs. S. Y. Hyde et als. Order removing case. Filed May 12th, 1881. Geo. P. Gardner, clerk, by A. W. White, dep'ty.

39 STATE OF MINNESOTA,
County of Freeborn:

In district court.

JOHN RUBLE AND JEROME P. GREEN, PARTners, as Ruble & Green, plaintiffs,
against
SAMUEL Y. HYDE, WILLIAM W. CARGILL, James Bassett, William F. Hunting, Joseph Reynolds, Henry Rowell, and Bartholomew F. Van Valkenburg, defendants.

I, George T. Gardner, clerk of the said court, do hereby certify that I have carefully compared the annexed complaint, answers, petition, and bond for removal, and order of removal, notices of motions, depositions, affidavit of publication, order remanding cause, with the originals on file in my office; that the same are true copies of all the pleadings, depositions, testimony, and other proceedings in this cause concerning or affecting the above-named defendants, Samuel Y. Hyde et al.

Witness my hand and the seal of said court at Albert Lea, in said county, this 17th day of March, A. D. 1881.

{ SEAL OF DIST. COURT, FREEBORN CO. } GEORGE T. GARDNER, *Clerk of the Court.*

(Indorsed:) Filed April 13, 1881. H. E. Mann, clerk.

40 The papers specified in the foregoing certificate which are in the first return from the State court are not repeated in the second return, as unnecessary. The notices of motion, affidavit of publication, & depositions are not included in this return, at request of appellants' counsel, and as deemed superfluous.

H. E. MANN, *Clerk.*

41 Circuit court of the United States for the district of Minnesota

JOHN RUBLE AND JEROME P. GREEN, plaintiffs, *against.* SAMUEL Y. HYDE, WILLIAM W. CARGILL, Bartholomew J. Van Valkenberg, Joseph Reynolds, James Bassett, William F. Hunting and Henry Rowell, defendants.

It is hereby agreed and stipulated that the separate answer of the defendant Henry Rowell be filed in this court as a part of the record; that the order of this court heretofore made on the 31st day of July, 1880, be vacated, and this cause considered by this court upon the petition filed to remove the whole action under the removal act of 1875, as well as the petition filed to remove the same and sever the cause, leaving it proceed in the State court as against the defendant Henry Rowell, as under the act of 1866; that the order of this court and decision on motion to remand be made upon each act.

That if an appeal or writ of error is taken from such order, it be submitted at the coming October term on printed briefs.

Dated July 5, 1881.

LOVELY & MORGAN, &
CAMERON, LASEY & BUNN,
Defendants' Attorneys.
J. H. PARKER, WITH
GORDON E. CALE,
Att'ys for Plaintiffs.

42 United States circuit court for the district of Minnesota.

Term minutes—June term, A. D. 1881, *July* 5, 1881.

Present, Hon. Rensselaer R. Nelson, judge.

JOHN RUBLE AND JEROME P. GREEN, *vs.* SAMUEL Y. HYDE, WILLIAM W. CARGILL, Bartholomew J. Van Valkenberg, Joseph Reynolds, James Bassett, William F. Hunting, and Henry Rowell.

This action having been removed from the district court of the county

of Freeborn, pursuant to the provisions of the removal act of Congress of 1875, and an order having been made remanding the same to the State court on July 31, 1880, and the case having been again removed to this court under the removal act of Congress of 1866, as to all the defendants except defendant Rowell, who is a citizen of the same State with plaintiffs leaving the action to proceed in the State court against him, and the case again coming on for hearing on a motion to remand, it is ordered that said cause be remanded to the State court; and a stipulation having been filed by the parties, consenting that said order of July 31, 1880, may be vacated and made as of this date, it is ordered accordingly, that said order of July 31, 1880, be, and the same is, vacated; and it is ordered that said case, under the removal proceedings
43 under the act of 1875, be remanded to the State court, and said order of July 31, 1880, be re-entered as of this date.

(Indorsed:) United States circuit court, district of Minnesota. John Ruble et al. vs. Samuel Y. Hyde et al. Return to *Supreme* Court.

(Indorsement on cover:) No. 1010. Samuel Y. Hyde, Wm. W. Cargill, James Bassitt, Wm. F. Hunting, Joseph Reynolds, B. J. Van Valkenburg, and Henry Rowell, plaintiffs in error, vs. John Ruble and Jerome P. Green. Minnesota C. C. U. S. Filed October 10, 1881.

REC. 1010—2

C

OFFICE SUPREME COURT U. S.
FILED
OCT 10 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States,

October Term, A. D. 1881.

SAMUEL Y. HYDE, et. al.,
Plaintiffs in Error,

against

JOHN RUBLE, et. al.,
Defendants in Error.

Brief for Plaintiffs in Error.

ANGUS CAMERON,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, A. D 1881.

SAMUEL Y. HYDE, WILLIAM W. CARGILL, JAMES BASSETT, WILLIAM F. HUNTING, JOSEPH REYNOLDS, HENRY ROWELL and BARTHOLOMEW J. VAN VALKENBURG,

Plaintiffs in Error,

vs.

JOHN RUBLE and JEROME P. GREEN,

Defendants in Error.

STATEMENT.

In this action Ruble and Green sued Hyde and others for the conversion of certain wheat. They allege that the defendants were co-partners dealing in and storing wheat at Albert Lea, Minnesota. That they stored certain wheat with the defendants to be held by them as bailees or warehousemen, with an agreement to purchase on certain terms. That they afterward demanded of the defendants that they purchase the wheat, but that the defendants refused, and converted the wheat to their own use, shipping it to Milwaukee and refusing to return the same to the plaintiffs.

The plaintiffs, Ruble and Green are citizens of Minnesota; Henry Rowell, one of the defendants, is a citizen of the same State. The other defendants are citizens of

Wisconsin and Iowa. Rowell answered seperately, denying his partnership with the other defendants. The other defendants answered jointly but separately from Rowell, denying among other things their alleged co-partnership with Rowell. The true controversy in the case exists between Ruble and Green, the plaintiffs and citizens of Minnesota, and the defendants except Rowell, who are citizens of Iowa and Wisconsin. It consists in the question whether such defendants were co-partners of Henry Rowell in his deal with the plaintiffs. The action was commenced in the District Court of the State of Minnesota.

This being the state of the issues all the defendants below joined in a petition to remove the suit to the Circuit Court of the United States, under the act of March 3, 1875. The record was sent to that court, whereupon the action was remanded to the State Court for want of jurisdiction. The order remanding was made July 31, 1880.

The defendants, who were citizens of Wisconsin and Iowa, being all the defendants except Rowell, thereupon joined in a petition to remove the case as to them, leaving it in the State Court as to Rowell, under the act of July 27, 1866. The record was again sent to the Circuit Court and by stipulation duly filed and on order of the court thereupon the order of July 31, 1880, remanding the case was vacated. The petitions for removal under each of the removal acts named being then before the court, the court made an order upon July 5, 1881, denying the removal under each petition and act of Congress named for want of jurisdiction, and to reverse this order the writ of error is sued out.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign as errors the following:

First. The court erred in holding that the cause was not removable under the second clause of the second sec-

tion of the act of Congress of March 3, 1875, and in remanding the same.

Second. If not removable under the act of 1875, still the court erred in holding that the cause was not removable so far as the defendants who were citizens of Wisconsin and Iowa were concerned, leaving it to proceed in the state court as against the defendant Rowell, under the act of July 27, 1866, and in remanding the same.

PROPOSITIONS OF LAW.

As to removal under act of 1875:

First. We submit that the action is one in tort for conversion of wheat. The plaintiffs sets up a delivery of wheat to the defendants as warehousemen for safe keeping, with the further agreement that the defendants would purchase the wheat on any day to be selected by the plaintiffs, and pay them Milwaukee prices on that day less advances and interest, storage and freight. They aver a demand that defendants perform the contract, but not content to stop here they go further and allege a conversion of the wheat to the defendants own use, and refusal to redeliver it; that before the demand the defendants had disposed of the wheat, and in fact *converted the same to their own use.* It is as if one sues a carrier, alleging a contract for carriage with a failure to deliver according to contract, and not content to stop here, goes further to allege a tortious appropriation and conversion by the carrier to his own use; or as if one, who stores goods for safe keeping to be returned to him on demand, or loans goods, in sueing the bailee goes further than to plead his contract and its breach, and sets up an actual wrongful sale, a trespass and conversion of the goods by the warehousemen or borrower to his own use. In all these cases the allegations are appropriate to an action for conversion, while the allegation of conversion is wholely inapt and superfluous in a suit on the contract. The pleading must be held to set out a cause for action in tort for the conver-

sion of the wheat. This conclusion is strengthened by the fact that the complaint sets out, by means of the allegation of conversion and removal of the wheat from the warehouse, a *criminal* offense under the act of the Legislature of Minnesota, of March 3, 1876. This act as construed by Judge Dillon, *McCabe vs. McKinstry*, 5 Dil., 514, and by Judge McCrary, in *Greenleaf vs. Dows, unreported*, makes the transaction set forth in the complaint a bailment and not a sale of the wheat. Ruble and Green still remained the owners, and the defendant Rowell the custodian for safe keeping. The title did not pass on delivery, and the delivery symbolized a bailment, not a sale. It follows that the allegation of conversion, in the complaint imports a wrongful appropriation by the defendants to their own use of the plaintiffs wheat. The action is in tort, and the contract is set forth as an inducement. The plaintiffs may have had an election between two remedies, but if they desired to recover for breach of contract, having stated the contract they should have pleaded that we had broken the contract simply, and asked to recover for that. But they allege that we converted the goods which implies a tort and is not an apt expression to designate a breach of contract. 1 Chitty on Pl., 150, 169, 173, 398. 2 id., 67, 68. *Bank vs. Brown*, 3 Wend., 158. *Wood vs. Ry. Co.*, 28 Wis., 398. *Walsh vs. Ry. Co.*, 42 Wis., 55. *Cracker vs. Ry. Co.*, 36 Wis., 668.

Second. The action being in tort the liability of the defendants is several as well as joint. One wrongdoer may be sued alone and judgment against one is no bar to a judgment against another. These are indisputable propositions of law. If sound, it follows that there is a separate controversy wholly between the plaintiffs and each one of the defendants which can be separately and fully tried without the presence of a co-wrongdoer as joint defendant.

Third. The cause, therefore, comes within the second clause of the second section of the act of March 3, 1875. There is a controversy wholly between the plaintiffs and

each defendant which can be fully tried as between them. This controversy forms the gist of the case, is a separate cause of action, judgment on it does not merge the cause of action against the resident defendant Rowell, and Rowell is not a necessary party to its determination. The case could have been brought and could proceed to judgment without Rowell's presence. It can be dismissed as to Rowell and still proceed the same as if he were a party. One joint wrongdoer may be acquitted and the others still held liable. These propositions are not in conflict with *Blake vs. McKim*, 103 U. S. 336. That was an action on joint contract, in which all the joint contractors were necessary parties. There non-joinder would have been cause of abatement.

Fourth. If the cause were to be treated as an action on joint contract, the same result follows. The statutes of Minnesota provide, that one joint debtor may be released without affecting the remedy against the others; that in actions against joint defendants the court may render judgment against or in favor of one, leaving the action to proceed against the others; and if the plaintiff fails to prove a joint cause of action against all he may still have judgment against such of the defendants as he proves a cause of action against. This makes a several controversy between the plaintiffs and each defendant in which the other defendants are not interested. It places such actions on nearly or quite the same ground as actions of tort. The plaintiffs may be defeated or may take judgment as against Rowell, and still the subject of their controversy with the other defendants be not defeated or merged, or in any way affected. This being an action at law, the state practice prevails in the Federal Court.

The statutes of Minnesota referred to are as follows:

CHAPTER 66.

Sec. 37. *Discharge of one or more partners or joint debtors.*

Any creditor who now has, or hereafter may have, a debt, demand or judgment against any co-partnership or several joint obligors, or

promisors, or debtors, may discharge one or more of such co-partners, obligors, promisors or debtors, without impairing his right to recover the residue of his debt or demand against the other co-partners, obligors, promisors or debtors, or preventing the enforcement of the proportionate share of any or all undischarged judgment debtors under such judgment.

Sec. 38. Same—*action against parties not discharged.* In all cases a suit may be brought and maintained against all or any such co-partners, joint obligors, promisors or debtors, not so discharged, setting forth, in the complaint thereof, that the contract was made with the defendants and the party so discharged, and that such party has been discharged. Such discharge shall have no other effect than such as is in this act mentioned.

Sec. 39. *Effect of Discharge.* Such discharge shall have the same effect for all purposes, and as to all persons, as a payment, by the party so discharged, of his equal part of the debt, according to the number of debtors, aside from sureties.

Sec. 264. *Judgment as between several parties.* Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it determine the ultimate rights of the parties on each side as between themselves.

Sec. 265. *Judgment as against one or more of several defendants.*

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Sec. 266. *Judgment against several defendants sued jointly with others.*

Whenever two or more persons are sued as joint defendants, and on the trial the plaintiff fails to prove a joint cause of action against all, but proves a cause of action against one or more of the defendants, judgment may be rendered against him or them against whom the cause of action is proven.

Blake vs. McKim does not conflict with this position. That was a case where the common law prevailed, making all the joint contractors necessary defendants. The Statute of Minnesota changes this rule.

The removal of this cause under the act of 1875, is, we think, supported by *Barney vs. Latham*, 103 U. S. 205. It was in that case held that the whole suit was removable as to all the parties whenever one of the con-

troversies in the case was of the character described in the act. This is stated as the effect of *Barney vs. Latham*, in *Blake vs. McKim*.

Fifth. A controversy exists between the plaintiffs and the non-resident defendants as to whether or not they were co-partners of Rowell. This is sufficient to give the Circuit Court jurisdiction. This controversy is the gist of the case. They deny any co-partnership with Rowell as alleged in the complaint. If co-partners Rowell is properly sued with them, if not he is not a proper party. This controversy is wholly between them and the plaintiffs, Rowell is not interested in it. It can be *fully tried as between them* The act, it is to be observed, does not require that the controversy shall be such as is capable of being fully determied between all parties, but only that it may be fully determined *as between them*; that is, as between the parties having the proper citizenship. If dropping Rowell from the record the court could determine the controversy fully as between the plaintiffs and the other defendants, then the cause is removable, although without the presence of Rowell the court may not be able to determine the controversy as to him. The question is, would dismissal as to Rowell abate the suit as to the other defendants.

As to removal under the act of 1866.

Sixth. The act of July 27, 1866, *is not repealed by the act of* 1875. There is no express repealing clause in the act of 1876. It repeals, if at all, by implication. If the second section be so liberally construed as to cover all cases within the act of 1866, then we may concede that the latter act is repealed. But if it does not provide for all the cases which fell within the act of 1866, if certain causes were removable under the act of 1866 which shall be held not removable under the act of 1875, then the former act is not repealed. The later act in that case would not cover all the ground covered by the earlier, and cannot repeal the earlier by implication merely. *Dillion on Re-*

moval of Causes, 3d Ed., §24; Mr. Justice Bradley in *Girardy vs. Moore*, 3 Woods 397, Mr. Justice Miller in *Avahope Co., vs. Ry. Co.*, 4 Dill, 277, and Judge Blatchford in *Wormsmer vs. Dahlman*, 16 Blatch. 319, have expressly held that the act of 1866 is unrepealed and still in force.

To repeal a statute by implication there must be such positive repungency between the provisions of the new and the old that they cannot stand together or be consistently reconciled, and even then the old law is repealed only *pro tanto* to the extent of the repugnancy. A repeal by implication is not favored, and cannot exist if it be possible to reconcile the two acts of the legislature together. The later act must also cover the whole ground. Judge Baxter, in a well reasoned opinion in *Cooke vs. Ford*, 4 Cent. L. J. 560, holds that the local prejudice act of 1867 is not repealed by the act of 1875. *Wood vs. United States*, 16 Pet. 342, per Story, J. *Cool vs. Smith*, 1 Black 459 per Swayne, J. *Brown vs. Co., Coms* 21 Pa. St. 42. *State vs. Blake*, 35 N. Y. 208.

Seventh. The cause is one in which there can be a final determination of the controversy so far as concerns the non resident defendants without the presence of Rowell.

Under the legislation of Minnesota which has been referred to, the plaintiffs may fail as to Rowell and still pursue the action as to the other defendants. They may dismiss as to Rowell, or he may obtain judgment. It does not abate the action against the others. Then cannot the cause as against the defendants petitioning be tried as well in a Federal as in a State Court? And when tried is not the controversy as *finally determined* as to them as if the other defendant were in the Federal Court? The controversy between the plaintiffs and the petitioning defendants is not dependant as to result on the outcome of the suit as to Rowell. His presence is not

essential under the Minnesota statute to a trial of the case as against them.

The precise point was decided by Judges Dillon and Dundy in *McGinnity vs. White*, 3 Dillon, 355, and by Judge Blatchford in *Wormsmer vs. Dahlman*, 16 Blatch. 319. See *Dillon on Removal of Causes*, 3d Ed. §63.

In *Vannevar vs. Bryant*, 21 Wal. 43, it was expressly stated by the Chief Justice to be left undecided, whether in an action of *tort* against several defendants, one could remove the suit so far as concerned himself under the act of 1866.

If this case comes within the act of 1866 as held by Judges Dillon and Blatchford, one of two things must follow: either the act of 1866 is unrepealed and and still applicable to the case, or the act of 1875 authorizes the removal, hence repealing by implication the law of 1866.

ANGUS CAMERON,
of Counsel for Plaintiffs in Error.

SUPREME COURT U. S.
FILED
OCT 24 1881

Supreme Court of the U. S.

SAMUEL Y. HYDE, ET. AL., Plaintiffs in Error,

against

JOHN RUBLE, ET. AL., Defendants in Error.

Points and Authorities of Defendants in Error.

GORDON E. COLE,
Solicitor and of Counsel for Defendants in Error.

WILLIAMS & DRAKE, PRINTERS, ALBERT LEA, MINN.

SUPREME COURT OF THE U. S.

SAMUEL Y. HYDE, et. al., Plaintiffs in Error,

against

JOHN RUBLE, et. al., Defendants in Error.

Points and Authorities of Defendants in Error.

First—The court below certainly did not err in holding that the action was not removable under the second clause of the second section of the act of 1875.—No attempt was ever made to remove it under that clause, and the court merely held that it was not removable under the first clause of that section. All the defendants, including the resident defendant Rowell, united in the application to remove the suit under the act of 1875. To procure removal under the second clause, the application can only be made by one or more of the plaintiffs or defendants actually interested in a contro-

versy which is wholly between citizens of different States. The petition for removal last filed did not ask to have the whole suit removed, but only that part of the same in which the non-resident defendants were interested, leaving the action to proceed in the state court as to the resident defendants, thus putting the application squarely upon the act of 1866, so that under neither petition could the court refuse to remand if, under the first clause of the second section of the act of 1875, or under the act of 1866, the case was not removable.

Second—The action is an action at law upon a joint contract, and such an action can neither be wholly removed under the second clause of the second section of the act of 1875 nor partially so under that of 1866.

The complaint, so far as material, sufficiently characterizes the action, to-wit: it alleges that defendants are partners in buying, shipping, and selling grain, and as such had an elevator and warehouse in Albert Lea, in the State of Minnesota; that plaintiffs delivered to said defendants a quantity of wheat to be stored in their warehouse; that said wheat was so delivered under and pursuant to a parol agreement between plaintiffs and defendants, by which, for value, de-

fendants agreed to receive said wheat and store the same for the plaintiffs as long as the plaintiffs should desire to store the same, for the consideration of one cent per bushel, and that when plaintiffs should desire to sell the said wheat, the defendants should purchase it at the highest market price; that at a time stated the plaintiffs notified defendants that they desired to sell the wheat and demanded pay for the same, but defendants refused to pay for the same the market price at the date of the demand as stated. This constitutes a complete statement of a cause of action for a breach of a joint contract.

This count or cause of action proceeds to add a clause which neither strengthens nor weakens the statement of the cause of action, and may well be rejected as surplusage. Following the statement that the defendants refused to pay for the wheat when demanded, the complaint proceeds "*although* they had long theretofore removed said wheat from their warehouse and shipped the same and had and did convert the same to their own use."

The use of the word "convert" in this superfluous clause is seized upon by counsel to transform a plain action on the contract into one of tort.

The second cause of action is stated as follows:

"That plaintiffs and defendants entered into an agreement whereby said plaintiffs were to deliver to said defendants divers quantities of wheat for storage, and defendants agreed to receive said wheat and ship the same to Milwaukee, and hold the same in store for

plaintiffs until they should order the same sold, and further agreed that when the plaintiffs should order the same sold defendants should pay plaintiffs therefor the Milwaukee market price, after deducting freight and commissions; that pursuant to said agreement plaintiffs delivered wheat to defendants and defendants received said wheat from the plaintiffs under and in pursuance of said contract to be by them kept, stored and disposed of according to the terms of said contract; that at a time stated, plaintiffs notified defendants that they desired to sell said wheat, and ordered the same sold and demanded of defendants pay for the same according to the terms of said contract, but defendants neglected and refused to pay the plaintiffs for the same, or any part thereof, and have ever since refused and still refuse to pay for the same."

The market price of wheat on the day of the demand in Milwaukee is stated.

It matters not whether the contract was one of bailment or sale; in either case it was a joint contract and the action was for breach of it.

The practice act of the State of Minnesota sufficiently fixes the nature of the action.

Sec. 54 of Title 5 of Chapter 66 of the Revised Statutes of 1866 (*see Young's Statutes, page 714*) declares: "The summons shall also contain a notice in substance as follows:

First—In an action arising on contract for the payment of money only, that he will take judgment for the sum specified therein if defendant fails to answer the complaint.

Second—In other actions for the recovery of money only that he will, upon such failure, have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained."

The summons in this action is under the first subdivision, which is confined to actions of contract.

Blake v. McKim, 13 Otto, 336, seems to be conclusive against the right of all the defendants herein to remove this case under the act of 1875 upon their joint petition.

Third—But the plaintiffs in error contend that even if the present is an action of contract it is still removable.

For this position they rely upon certain statutes of Minnesota. *Sec. 37, Chap. 66*, authorizes the voluntary discharge of one joint debtor retaining a right of action for his proportionate share against another.

This statute was for the purpose of relieving against a difficulty existing at the common law by which the discharge of one joint debtor discharged all, but does not at all affect the rights of a creditor who does not choose to avail himself of it. He may retain all his rights jointly against his debtors and may and must bring a joint action if he has not settled and released any.

Sec. 264 has special reference to equity cases, and provides that: "Judgment may be given for or against one or more of several plaintiffs or defendants and may determine the ultimate rights of the parties on each side as between themselves."

This was common in chancery, and is extended by this section to proceedings to enforce equitable rights under the code.

Sec. 265 does apply to a common law action, and in an action against several defendants, permits a judgment against one or more of them *whenever a several judgment would be proper.*

But a several judgment would never be proper where, upon a joint contract, a joint liability was established.

Sec. 266 relieves against a technical rule of pleading whereby in a suit on a joint contract the plaintiff could not recover unless he established a joint liability. Under this section, if he fails to prove a joint liability, but does prove a several liability against some of the defendants, he may have judgment accordingly; but if he pleads and proves a joint liability his rights in an action on a joint contract are just what they always were at common law.

These sections then can have no effect upon the removability of this action.

Fourth—Supposing the act of 1866 is still in force,—which we deny,—can there be a final determination of the controversy presented by the pleadings, so far as concerns the non-resident defendants, without the presence of the resident defendant?

The resident defendant has filed a separate answer,

in which he admits receiving some wheat on his own account, which he says he paid for, and denies the partnership, and puts in issue all the other allegations of the complaint, and does not admit the receipt on his own account even of the particular wheat referred to in the complaint. The non-resident defendants, answering together, but separately from the resident defendant, deny the co-partnership, and put in issue all the other issues tendered by the complaint, so that all parties in a suit for a breach of a joint contract deny that there is a joint contract, and deny all the allegations in the complaint.

Rowell, the resident defendant, is as much interested in the decision of the question as to whether there is a partnership or joint contract existing as any other partner or alleged partner. Suppose the non-resident defendant should die during the pendency of the suit, the action would survive as against him, and judgment for the entire amount might be rendered against him. Whether judgment could be rendered against him on account of a contract or any acts done or agreements made by any of the other defendants, would depend upon the decision of the issue of partnership or joint contract. Whether a sole judgment shall be rendered against him, enforceable out of his property, or a joint judgment enforceable out of the co-partnership property; whether he may in case of being compelled to pay the judgment have a remedy over for contribution against his co-defendants; whether they in case of

judgment against them can have a remedy against him for contribution, are all questions about which he cannot be indifferent. We undertake to say that it is impossible to determine the question whether a joint contract exists without having all the alleged joint debtors present in court.

No statute of Minnesota permits a separate action to be brought on a joint contract, except in the single case of a previous release of one of the joint debtors.

In *Barney v. Latham, 13 Otto, 205*, there were two distinct controversies; one between the plaintiffs and the non-resident defendants for the proceeds of certain lands sold by them, and another between the plaintiff and the resident defendant concerning the title to certain lands held by it. The action was an equitable one, and while it was claimed by the plaintiff that both controversies grew out of one transaction, yet the decision of the court proceeded upon the ground that the two controversies were independent and distinct. The removal was on petition of the non-resident defendants only, under the 2d clause of the 2d section of the act of 1875.

The case of *the Sewing Machine Companies, 18 Wallace, 553*, was, like the present, an action at law for the breach of a joint contract. Two of the defendants were citizens of a state other than that in which the suit was brought, and the third a citizen of the state in which the suit was brought, and of which the plaintiff was also a citizen.

The case was argued by counsel distinguished for their pre-eminent ability, among them the late Judge Curtis. The claim was that the suit was removable on the petition of the two non-resident defendants under the act of 1866, but although the act of 1866 received a critical examination by both court and counsel, it was not suggested by either that the case was removable as to the non-resident defendants under that act.

The counsel for plaintiff in error say in regard to it:

"It was soon apparent that this act could not effect much practical change or relief, as the number of cases to which it could be applicable was very limited indeed, as cases seldom arise in which there can be a final determination of the controversy as to one co-defendant without the presence of the other defendants as parties to the case!"

The counsel for defendants in error said—and this does not seem to have been controverted by counsel or court—"We have not a separated controversy with any of the three defendants, no more than in a suit against a corporation we should have a controversy with each of the corporators; the suit might affect each, but that would not make the suit a controversy with each; we have a controversy with the opposing parties to the suit, that is to say with the three corporations. The controversy is the entire controversy between the parties who are parties to the suit, one side of them being a composite body over which the constitution does not authorize the federal courts to take jurisdiction!"

And the court in rendering its decision, after critically examining the act of 1866, so far from intimating that the case could have been severed and

the part as to the non-resident defendants have been removed, says of it: "Considering the stringent provisions which are embodied in the last named act, it is doubtful whether it will prove to be one of much practical value."

It is as clear as anything can be in the absence of express decision on the point, from the assumptions which are made all through the case of the sewing machine companies, that neither court nor counsel, although their attention was especially directed to the act of 1866, which is always an important point in determining the weight to be attached to judicial expression, thought an action for breach of a joint contract could be removed by one of the alleged parties to such a contract, and the fact that whether there was such joint contract is one of the issues does not certainly make it any more removable, because all of the alleged joint parties are necessarily equally concerned in the decision of that question.

Fifth—But the act of 1866 has been repealed by that of 1875, the second clause of the second section of which having legislated fully upon the subject and declared, in view of the difficulties and embarrassments which arose from the attempted severance, that

such cases should *not* be severed, but should be *wholly* removed as to all the defendants.

Counsel for the plaintiffs in error argue that if the act of 1875 does not provide for all the cases which fell within the act of 1866, then the former act is not repealed; but if the second section may be so liberally construed as to cover all cases within the act of 1866, then they concede that the later act is repealed. But the learned counsellors have failed to point out or suggest any case within the act of 1866 which would not fall within the act of 1875.

Judge Dillon says: "If a liberal construction shall be and constitutionally can be given to the latter portion of section two of the act of 1875, his remarks as to a repeal, that is that it is repealed by the latter act, may possibly apply."

Dillon upon Removal of Causes, sec. 24, 3d ed.

Disregarding nominal parties, a single controversy of which there can be a final determination so far as concerns certain defendants without the presence of others, must be "wholly" between the plaintiff and the former; but a controversy which is wholly between citizens of different states, and which can be fully determined between them, is the very thing that is fully and exactly provided for by the second clause of the second section of the act of 1875.

But the liberal construction which Judge Dillon referred to has been given to the second clause of the

second section of the act of 1875 by this court in *Barney v. Latham*, which ~~above rule~~ case does also practically decide that the act of 1866 is repealed. The court says, after quoting the act of 1866:

"This provision is explicit and leaves no room to doubt what Congress intended to accomplish. It proceeds plainly upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a state other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such a case, although the citizen of another state, under the particular mode of pleading adopted by the plaintiff, is made a co-defendant with one whose citizenship is the same as the plaintiff, he should not, as to his separable controversy, be required to remain in the state court and surrender his constitutional right to invoke the jurisdiction of the Federal Court, but that, at his election at any time before the trial or final hearing, the cause so far as concerns him might be removed into the Federal Court, leaving the plaintiff, if he so desires, to proceed in the state court, leaving the plaintiff, if he so desires, to proceed in the state court against the other defendant or defendants."

Having defined the scope of the act of 1866, the court proceeds to compare with it and also define the scope of the second clause of the second section of the act of 1875. It says:

"We are of opinion that the intention of congress by the clause under consideration was not only to preserve some of the essential features or principles of the act of 1866, but to make radical changes in the law regulating the removal of causes from the state courts."

Omitting several lines not material to the present argument, the court proceeds:

"Both acts recognized the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies, but while the act of 1866 in express terms authorizes the removal only of the separable controversy between the plaintiff and the defendants seeking such removal, leaving the remainder of the suit at the election of the plaintiff in the state court, the act of 1875 provides *in that class of cases* for a removal of the entire suit. That such was the intention of congress is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that congress intended to leave any part of the suit in the state court, where the right of removal was given to and was exercised by any of the parties to a severable controversy therein. Much confusion and embarrassment as well as increase in the costs of litigation had been found to result from the provision of the former act permitting the separation of controversies arising in a suit, removing some to a Federal Court and leaving others in a state court for determination. It is often convenient to embrace in one suit all the controversies which are so far connected by their circumstances as to make all who sue or are sued proper though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions, congress determined that the removal of the separable controversy to which the judicial power of the United States was by the constitution expressly extended should operate to transfer the whole suit to the Federal Court. If the clause of the act of 1875 now under consideration, is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the act of 1866 which, *ex industria*, limited the removal in the class of cases therein provided for to that controversy in the suit which is distinctively between citizens of different states and of which there could be a determination without the presence of the other de-

fendants as parties in the case."

If the act of 1866 declares that part of the suit shall remain in the state court, and the act of 1875, *in just such a case*, declares it shall all be removed, or to quote the exact language of the court, if "the act of 1866 authorizes the removal only of the separable controversy, while the act of 1875 provides *in that class of cases*, for the removal of the entire suit," both certainly cannot stand, and the latter act repeals the former.

In fact, the attempt to remove this action under the act of 1866 seems to be an experiment. It has never before in any of the cases which have come before this court, been supposed that the removal of part of an action at law for the breach of a joint contract could be had under the act of 1866. The Sewing Machine Company cases, *18 Wallace*, *Blake v. McKin*, *13 Otto*, and the first attempt to remove this case, were attempts to remove the entire case upon the theory that where any of the controversies or part of a controversy was between citizens of different states, it was removable—a position which was overruled in *Meyer v. Construction Co.*, *100 U. S.*, *457*.

Nor does it follow that if the suit is not removable under the act of 1866, it must be removable under the last clause of the second section of the act of 1875. They both embrace the same class of cases;

if not removable under the one it is not under the other. A suit at law for the breach of an alleged joint contract, but which is denied by the defendants to be a joint contract, is not *wholly* between any of the defendants. It is in no sense a severable controversy; all are equally interested in its determination, and it is only when it shall be determined that there is no joint contract that the action becomes severable. But the court cannot assume in advance the very question to be tried for the purpose of assuming jurisdiction. If it was joint the plaintiff is entitled to a joint judgment; and to obtain that the presence of all the parties against whom it is to be rendered is indispensable.

Sixth—As the case of *Barney v. Latham* was decided by a divided court and under circumstances which perhaps render it doubtful whether upon the constitutional question it is authoritative as a precedent, I respectfully renew the objection, that except where merely nominal parties are concerned, or where parties may be arranged upon different sides of a case in accordance with their interest, the circuit courts of the United States cannot under the constitution take jurisdiction of controversies between citizens of the same state, although citi-

zens of different states may be necessary parties to the action.

Such was the intimation of this court in *Ober B. Gholager, 93 U. S., 99.* The question was very ably argued in the *Sewing Machine Cases*, and the court, in that case as in the removal cases and the case of *Blake v. McKin*, cited *ante*, upheld the law by placing such a construction upon it as to exclude the case of real concontroversies between citizens of the same state.

The case of *Latham v. Barney* is in reality the first and only case in which this court has extended the federal jurisdiction to real and genuine controversies between citizens of the same state.

The constitution of the United States (unlike the state constitutions, which are restrictions upon otherwise unlimited power) is an affirmative grant of power, by which nothing passes except the powers actually granted and by necessary implication those incidental powers necessary to the exercise of those expressly granted. It gives the grant of judicial power in these words:

"The judicial power shall extend to controversies between citizens of different states."

Here it stops. It does not extend to controversies between citizens of the same state, and the fact that until the broad principles of construction and centralizing tendencies which were the outgrowth of the civil war superceded the strict construction of the early fathers, no attempt was ever made to extend it to con-

troversies between citizens of the same state, affords an argument against such a construction. Such power is certainly not given in express terms. Does it follow by implication, because without it the judicial power actually granted cannot be exercised? But in many cases it may be exercised, if there can be a substantial exercise of the granting power without resorting to implication. The mere fact that cases sometimes arise in which by the accidents of business citizens of different states find themselves entangled with citizens of the same state to such an extent as to compel them to forego the right to a hearing in a Federal tribunal, is not such a uniform obstacle to the exercise of the granted power as will create or give rise to the necessary implication out of which grow these most dangerous constructive powers. But the clause of the constitution which next follows the one we are considering, extends the judicial power to "citizens of the same state claiming lands under grants from different states." This is the only case in which the judicial power is extended to citizens of the same state. Had it been intended to extend it to citizens of the same state when joined with citizens of different states the careful, cautious and usually accurate framers of that instrument would have embodied an apt declaration of such intention in the fundamental law. The fact that they omitted to do so makes the maxim "*Expressio unius est exclusio alterius*," applicable.

The argument that a strict construction would permit a plaintiff to always defeat the jurisdiction of the Federal tribunals by uniting a citizen of the same state is of no force, because if such parties were not proper parties the objection could be taken by plea in abatement; or if merely nominal or not proper parties their presence could be disregarded on a motion to remand.

The argument that the object of the framers of the constitution was to provide an impartial tribunal for citizens of different states, and that this object would be thwarted if the presence of citizens of the same state prevented a removal, loses sight of the fact that the presence of those parties would prevent the anticipated partiality of the state tribunals in favor of their own citizens, as they would be represented on both sides of the controversy.

But the framers of the constitution intended protection to popular rights as much by what they omitted to say as by what they said. The right to a speedy and inexpensive trial by a jury of the vicinage has always been a cherished right at the common law. The dragging of a citizen of a state away from the court which sits in his county, with his witnesses, to the, to him, strange and expensive tribunal at the capital of the state, is a serious grievance, and the constitution, by omitting to deprive him of his rights, spoke as eloquently in his behalf by its silence as it did in behalf of the citizens of different states by the clause I have quoted.

GORDON E. COLE,
Attorney for Defendants in Error.

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14-410

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 107.

LUCRETIA BRONSON, EXECUTRIX OF G. C. BRONSON, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JOHN W. SCHULTEN AND CHAUNCEY D. HURD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 107.

LUCRETIA BRONSON, EXECUTRIX OF G. C. BRONSON, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between John W. Schulten & Chauncy D. Hurd, plaintiffs, and Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, defendant, a manifest error hath happened to the great damage of the said Lucretia Bronson, executrix, &c., of G. C. Bronson, deceased, as by her complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

SAML BLATCHFORD.

2 (Indorsed:) U. S. Supreme Court. Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, plaintiff in error, against John W. Schulten & Chauncy D. Hurd, defendants in error. Writ of error. Stewart L. Woodford, att'y for pl'ff in error. U. S. circuit court, July 26, 1878, John I. Davenport, clerk.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def'ts in Error.

JULY 26, 1878.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 27 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Lucretia Bronson, as executrix of the last will and testament of G. C. Bronson, deceased, plaintiff in error, against John W. Schulten and Chauncy D. Hurd, as the same rema of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this day of October, in the year of

our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

3 U. S. circuit court, southern district of New York.

C. GIGNOUX ET AL. *vs.* HEMAN J. REDFIELD.
J. W. SCHULTEN ET AL. *vs.* SAME.
WM. BRUNNER ET AL. *vs.* SAME.
J. S. GOURD ET AL. *vs.* SAME.
S. GUILLAUME ET AL. *vs.* SAME.
E. B. STRANGE ET AL. *vs.* SAME.
E. WARBURG ET AL. *vs.* SAME.
O. ZOLLIKOFFER ET AL. *vs.* SAME.
C. F. DAMBMANN ET AL. *vs.* SAME.
T. PASSAVANT ET AL. *vs.* SAME.
C. PAYEN ET AL. *vs.* SAME.
JOHN SYZ ET AL. *vs.* SAME.
H. LEWIS ET AL. *vs.* SAME.
F. SCHUCHARDT ET AL. *vs.* SAME.
M. MITCHELL ET AL. *vs.* SAME.
A. LACHAISE ET AL. *vs.* SAME. 354.
J. W. SCHULTEN ET AL. *vs.* GREENE C. BRONSON.
WM. LOESCHIGK ET AL. *vs.* SAME.
F. A. SPIES ET AL. *vs.* SAME.
L. GROSSMANN *vs.* A. SCHELL.
E. WARBURG ET AL. *vs.* SAME.
C. PAYEN ET AL. *vs.* H. BARNEY.
F. SCHUCHARDT ET AL. *vs.* A. SCHELL.

SIR: Please take notice that upon the annexed affidavits and copies of verdicts a motion will be made before a judge of this court on
4 the 30th day of December, 1876, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the judgments in the above-entitled causes be opened and the case referred to a referee to ascertain and adjust the amounts due the plaintiffs under the verdicts in each of said cases respectively, and to report the facts so found by the referee to this court to be passed upon, and for such other and further relief as may be proper.

Dated Dec. 27th, 1876.

Yours, &c.,

ALMON W. GRISWOLD,
Pl'ff's' Att'y.

To GEORGE BLISS, Esq.,
Def't's Att'y.

U. S. circuit court, southern district of New York.

C. GIGNOUX ET AL. *vs.* H. J. REDFIELD.
J. W. SCHULTEN ET AL. " SAME.
WM. BRUNNER ET AL. " SAME.
J. S. GOURD ET AL. " SAME.
S. GUILLAUME ET AL. " SAME.
E. B. STRANGE ET AL. " SAME.
E. WARBURG ET AL. " SAME.

O. ZOLLIKOFFER ET AL. " SAME.
C. F. DAMBMANN ET AL. " SAME.
T. PASSAVANT ET AL. " SAME.
CHS. PAYEN ET AL. *vs.* H. J. REDFIELD.
JNO. SYZ ET AL. " SAME.
HENRY LEWIS ET AL. " SAME.
5 F. SCHUCHARDT ET AL. *vs.* SAME.
M. MITCHELL ET AL. " SAME.
A. LACHAISE ET AL. " SAME.
J. W. SCHULTEN ET AL. " G. C. BRONSON.
WM. LOESCHIGK ET AL. " SAME.
F. A. SPIES ET AL. " SAME.
L. GROSSMANN " AUG. SCHELL.
E. WARBURG ET AL. " SAME.
CHS. PAYEN ET AL. " H. BARNEY.
F. SCHUCHARDT ET AL. " AUGUSTUS SCHELL.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Almon W. Griswold, being duly sworn, says that the above-entitled actions were brought to recover excess of duties paid on charges and commissions; that they came on for trial and verdicts were rendered for the plaintiffs and judgments entered thereupon in the years 1860 to 1866; and that copies of the verdicts rendered in said cases are hereto annexed.

That the adjustments in all the cases but three appear to have been made by the collector of customs or Samuel G. Ogden, jr., auditor at the custom-house in this city, and the other three cases by the clerk of the court, to whom the cases were referred for that purpose.

That these adjustments were made by said collector of customs and by said auditor and clerk of this court, and the reports based thereon were duly filed and judgments entered thereon, and subsequently paid and satisfied of record as follows, to wit: In the cases of

C. GIGNOUX ET AL. *vs.* H. J. REDFIELD, on March 3d, 1860.
6 J. W. SCHULTEN ET AL. " H. J. REDFIELD, " April 5th, 1860.
WM. BRUNNER ET AL. " SAME, " Dec. 30th, 1861.
J. S. GOURD ET AL. " SAME, " June 22nd, 1860.
S. GUILLAUME ET AL. " SAME, " May 15th, 1861.
E. B. STRANGE ET AL. " SAME, " Feb'y 13th, 1864.
E. WARBURG ET AL. " SAME, "October 6th, 1860.
O. ZOLLIKOFFER ET AL. " SAME, " Jan'y 9th, 1860.
C. F. DAMBMANN ET AL. " SAME, " Nov. 17th, 1863.
T. PASSAVANT ET AL. " SAME, " April 30th, 1861.
C. PAYEN ET AL. " SAME, " Nov. 24th, 1860.
JOHN SYZ ET AL. " SAME, "March 20th, 1861.
HENRY LEWIS ET AL. " SAME, " April 15th, 1863.
F. SCHUCHARDT ET AL. " SAME, " June 9th, 1860.
M. MITCHELL ET AL. " SAME, " Feb'y 13th, 1864.
A. LACHAISE ET AL. " SAME, " June 10th, 1864.
J. W. SCHULTEN ET AL. " G. C. BRONSON, "March 21st, 1860.
WM. LOESCHIGK ET AL. " SAME, " April 9th, 1861.
F. A. SPIES ET AL. " SAME, " June 7th, 1861.
L. GROSSMANN *vs.* AUG. SCHELL, Feb'y 7th, 1866.
E. WARBURG ET AL. " SAME, August 18th, 1865.
CHS. PAYEN ET AL. " H. BARNEY, March 22nd, 1865.
FERDINAND SCHUCHARDT ET AL. *v.* AUG. SCHELL, Jan'y 10th, 1865.

That early in 1864 deponent discovered that in the first fourteen of the above-entitled actions errors had been committed and items omitted in the adjustments by which the plaintiffs in each had recovered less than the amount due them under the verdicts, and for the purpose of recovering the amounts thus erroneously omitted in such adjustments and
7 judgments, new actions were commenced against the defendant Redfield on the 19th day of May, 1864.

To these actions the defendant interposes the plea of the statute of limitation, which defense deponent is apprehensive will prevail and thereby defeat the plaintiffs' claims.

That as to the remaining cases this deponent had no knowledge or suspicion that the adjustments were not made in accordance with the verdicts, or that items embraced in the bills of particulars had been omitted until the recent adjustment of the cases of Chs. Payen et al. vs. Aug. Schell, Louis Grossman et al. vs. Heman J. Redfield, and William Loeschigk et al. vs. Heman J. Redfield, and certain other cases, when it was discovered that mistakes had been made in the adjustment of the case of Chs. Payen vs. Barney and L. Grossmann vs. Schell, William Loeschigk et al. vs. G. C. Bronson, and other cases, the verdicts in which were similar to those in the cases hereinabove named; upon readjusting the verdicts in these cases, first above mentioned, it became necessary to examine the entries of the pl'ffs made to other collectors, and that disclosed the fact that omissions and mistakes had been made in the adjustments of these cases also, by omitting items embraced in bills of particulars, and also because of their not having been adjusted according to the verdict, one having been adjusted upon the basis of Phillips' report only, without the modification of Treasury instructions of May 21st, 1863, as provided in said verdicts, while as to the first twenty-two of said cases, the adjustments were not made according to Phillips' report, as provided in the verdicts given in said cases, and items were omitted.

8 Deponent further says that by reason of these mistakes in the adjustments, there is still due the plaintiffs in the above-entitled causes a portion of the money due them under said verdicts, for excess of duty paid on charges and commissions, and that such amounts cannot be ascertained without an examination of all the invoices and entries, and for that purpose the judgments should be opened and the cases sent to a referee to have the amounts of the plaintiffs' damages in said causes readjusted according to the verdicts so rendered therein.

Deponent says that all the facts in said cases are precisely similar to those in the cases of J. W. Schulten et al. vs. Aug. Schell, Louis Grossmann vs. H. J. Redfield, C. Payen et al. vs. Aug. Schell, and in which the judgments were opened by order of this court in the first case on June 20th, 1871, and in the other cases on Aug. 13th, 1873, and the cases referred to a referee and readjusted according to the verdict therein.

ALMON W. GRISWOLD.

Sworn before me this 27th day of December, 1876.

CHAS. LEE CLARK,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustus Heydenriech, being duly sworn, says the adjustments in 20 of the above-entitled cases were made at the custom-house under the direction of the collector of the customs, or the auditor of the customs, and in three cases by the clerk of this court or his deputy.

9 Upon investigation deponent finds that the adjustments in the above-entitled cases were not made according to the verdicts, and also that items were omitted in said adjustments which were embraced in the bills of particulars, and should have been included therein; and by reason of these errors and omissions the plaintiffs in said several actions have not received the full amount of their respective claims.

Deponent says these errors in the adjustments may be accounted for from the fact that at the time these verdicts were in course of adjustment a very large number of other verdicts, some of which differed from the verdicts in these cases, were also in course of adjustment, and the clerks employed on the work may have mistaken the form of verdict.

A. HEYDENREICH.

Sworn before me this 27 day of December, 1876.

CHAS. LEE CLARKE,
Notary Public, N. Y. Co.

U. S. circuit court.

C. GIGNOUX ET AL.
vs.
HEMAN J. REDFIELD & 22 OTHER CAUSES.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry K. Murray, being duly sworn, says he is refund clerk in the naval office, New York custom-house, and has been for near five years; that he has this day examined the entries, invoices and papers
10 in the case of William Loeschigk et al. vs. Greene C. Bronson, which was adjusted under the verdict on charges and commissions and paid in the year 1861.

That out of the entries by seventy-four vessels and steamers specified in the plaintiffs' bill of particulars served in the case thirty entries which should have been included in such adjustment were omitted, and no part of the excess of duty paid by plaintiffs on those entries was refunded in that case, or has been since.

Deponent further says that he was not refund clerk at the time said case was adjusted.

H. K. MURRAY.

Sworn before me this 20th day of January, 1877.

A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

11 United States circuit court, southern district of New York.

THURSDAY, *January 26th*, 1860.

Present, Judge Betts.

J. W. SCHULTEN ET AL.
vs.
G. C. BRONSON.

On motion of Mr. Griswold for plaintiffs, verdict for the plaintiffs, subject to adjustment by Samuel Ogden, jr., as referee, for amount with interest of the difference between duties levied and paid under protest

on commissions at 2½ per cent. and such duties if levied on commissions at 2 per cent. on all importations specified in the bill of particulars in this cause from Sweden, Denmark, Norway, France (except Paris), Switzerland, Germany, Netherlands, Prussia, and the cities of Bremen, Hamburg and Antwerp, and a like verdict for the plaintiffs for any excess of duties levied and paid under protest as specified in the bill of particulars upon charges over and above those set forth in Exhibit D, being the report of Isaac Phillips, appraiser, mentioned and referred to in his testimony, except where the invoice may show that a higher rate of charges was actually paid, and like verdict for the amount of the difference between the sum of duties paid by the plaintiffs under protest upon plaid flannels at thirty per cent. and the sum of such duties if assessed at the rate of twenty-five per cent. on all importations specified in the bill of particulars in this cause.

12 U. S. circuit court, southern district of New York.

J. W. SCHULTEN ET AL.
vs.
GREENE C. BRONSON AND 22 OTHER CAUSES.

A motion having come on to be heard before this court in the above-entitled causes to open the judgments therein:

Now, on reading and filing notice of motion dated December 27th, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich, on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiff', and George Bliss, esq., U. S. district attorney, in opposition thereto, and due deliberation had, it is ordered that the judgments entered in the above-entitled causes upon the verdicts therein be vacated, and that the assessments of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, esquire, as sole referee.

And it is further ordered that the referee proceed to adjust de novo the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases respectively, and that he report the balance, if any, found due the plaintiffs in each of said causes.

The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, and either party
13 may, on the hearing, raise objections, and said referee shall decide thereon, and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring them to a hearing before the court upon four days' notice.

Dated January 26, 1877.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al. vs. Heman J. Redfield & 22 other causes. Order of reference. A. W. Griswold, pl'ffs' att'y. Filed Jan'y 27, 1877.

14 U. S. circuit court, southern district of New York.

J. W. SCHULTEN ET AL. *vs.* GREENE C. BRONSON.	O. S. 29.
WILLIAM LOESCHIGK ET AL. *vs.* GREENE C. BRONSON.	O. S. 294.
F. A. SPIES ET AL. *vs.* GREENE C. BRONSON.	O. S. 291.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Almon W. Griswold, being duly sworn, says he is the attorney for the plaintiffs in the three above-entitled actions; that since the commencement of said actions the defendant, Greene C. Bronson, died, and that Lucretia Bronson was appointed executrix of said defendant's last will and testament.

ALMON W. GRISWOLD.

Sworn before me March 2nd, 1877.
[SEAL.]

A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

15 The people of the State of New York to all to whom these presents shall come, or may concern, send greeting:

Know ye, that we, having inspected the records of our surrogate's court in and for the county of New York, do find that on the 13th day of October, in the year one thousand eight hundred and sixty-three, by said court, letters testamentary on the estate of Greene C. Bronson, late of the city of New York, deceased, were granted and committed unto Lucretia Bronson, of said city, the sole executrix named in the last will and testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto affixed. Wi'ness, Delano C. Calvin, surrogate of our said county, at the city of New York, the second day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.]

PETER BURTSELL,
Clerk to the Surrogate's Court.

16 U. S. circuit court, southern district of New York.

J. W. SCHULTEN ET AL.
vs.
GREENE C. BRONSON.

WILLIAM LOESCHIGK ET AL.
vs.
GREENE C. BRONSON.

F. A. SPIES ET AL.
vs.
GREENE C. BRONSON.

On reading and filing the annexed affidavit, and after hearing A. W. Griswold in support of the motion, and H. E. Tremain, esq., assistant U. S. district attorney, in opposition thereto:

Now, on motion of Almon W. Griswold, plaintiffs' att'y, ordered that the three above-entitled actions be continued in the name of Lucretia Bronson, executrix of the last will and testament of Greene C. Bronson, deceased, as defendant, without prejudice to any proceedings heretofore had or any waiver of any objections heretofore existing, provided the plaintiffs consent to the entry of a certificate of probable cause.

Dated March 8th, 1877.

(Signed) SAML. BLATCHFORD.

(Endorsed:) U. S. circuit court. J. W. Schulten et al. *vs.* Greene C. Bronson and 2 other causes. Affidavit, certificate, and order reviving actions. A. W. Griswold, pl'ffs' att'y.

17 U. S. circuit court, southern district of New York.

J. W. SCHULTEN ET AL.
vs.
LUCRETIA BRONSON, EXECUTRIX, &c.

WILLIAM LOESCHIGK ET AL.
vs.
THE SAME.

F. A. SPIES ET AL.
vs.
THE SAME.

The plaintiffs in each of the above-entitled causes consent that a certificate of probable cause be entered in each of said causes.

Dated March 8, 1877.

ALMON W. GRISWOLD,
Pl'ffs' Att'y.

(Endorsed:) U. S. circuit court, southern district of New York. J. W. Schulten et al. vs. Greene C. Bronson and 2 other causes. Affidavit, order reviving actions, & consent. A. W. Griswold, pl'ffs' att'y. Filed Mch. 9, 1877.

18 Circuit court of the United States for the southern district of New York.

J. W. SCHULTEN ETAL.
vs.
LUCRETIA BRONSON, EXECUTRIX, &c.

In pursuance of an order made in the above-entitled cause on the 26th day of January, in the year one thousand eight hundred and seventy-seven, by which it was referred to the undersigned to ascertain and report to this court whether, according to the verdict in said cause, anything, and, if so, how much, is due the plaintiff in this cause for duties on charges and commissions beyond the amount awarded therefor by the former report in said cause:

Now, I, John I. Davenport, to whom the matter was referred, do report: That I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiffs' claim, and do find that under the verdict in said case there is now due the plaintiffs herein from the defendant, as collector of the port of New York, as and for duties on charges and commissions
19 beyond the amount awarded therefor by the said former report,

the sum of twelve hundred and five & $\frac{90}{100}$ dollars in gold and silver coin, or in Treasury notes issued under the authority of the United States, principal, and to interest on said sum from the date of payment to the date of this my report, amounting to two thousand and seventeen & $\frac{21}{100}$ dollars, amounting, in the aggregate, to the sum of thirty-two hundred and twenty-three & $\frac{11}{100}$ dollars, and that a statement of the said excess so paid by the said plaintiffs to the said defendant as and for duties on charges, and as and for duties on commissions beyond the said amount heretofore awarded therefor, together with the interest due thereon, forming part of this my report, is on file in the office of the collector of customs at the port of New York. All of which is respectfully submitted.

Dated New York, March 1st, 1877.

JOHN I. DAVENPORT, *Referee.*

$1,205.90
2,017.21

3,223.11

Referee's fees, $57.00.

(Endorsed:) U. S. circuit court, southern district of New York. J. W. Schulten et al. vs. Lucretia Bronson, executrix, &c. Referee's report. John I. Davenport, referee. Filed M'ch 10, 1877.

20 U. S. circuit court.

J. W. SCHULTEN ET AL.
vs.
LUCRETIA BRONSON, EXECUTRIX, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 2d day of Sept., 1858, last past, an action was commenced in the superior court of the State of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court; that the defendant afterwards, by his attorney, duly appeared in said action and such proceedings were thereupon had that afterwards, and on the 22d day of September, in the year of our Lord one thousand eight hundred and fifty-eight, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly by their attorney aforesaid complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 1st day of November,

one thousand eight hundred and fifty-three, at the city of New York, was indebted to the said plaintiffs in the sum of three thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of three thousand dollars, of lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs
21 well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has wholly refused, and still does refuse, to the damage of the said plaintiffs of three thousand dollars, and thereof the plaintiffs bring suit, &c

A. W. GRISWOLD,
Attorney for Plaintiffs.

(Indorsed:) U. S. circuit court. vs. Heman J. Redfield. Declaration. A. W. Griswold, pl'ffs' att'y.

Please take notice, that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of Common Rules, kept in the office of the clerk of this court, at the city of Utica, requiring the within-named defendant to plead to said declaration in twenty days after service of a copy thereof and notice of said rule or judgment, on his attorney.

New York, 186 .

A. W. GRISWOLD,
Pl'ffs' Att'y.

Service of a copy of within and of the above notice is admitted.

22 And the said defendant, by the U. S. dist. attorney, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c. Therefore, the issue above joined is ordered by

the said court to be tried at a circuit court appointed to be held at the City Hall of the city of New York, on the 3d Monday of October, in the year 1859. And now at this day, to wit, the 26th day of January, 1860, being as yet of the said October term, before the said justices, at the City Hall of the said city of New York, came the said parties by their attorneys aforesaid; and the said circuit judge, before whom the said issue*d* was tried, has sent hither his record had before him, in these words, to wit:

23 Afterwards, that is to say, on the day and at the place within contained, before the judge of the said *said* circuit court, came as well the within named plaintiffs as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also came, who, to speak the truth in the matters within contained, being chosen, tried, and sworn, upon their oaths do say that the said defendant did undertake and promise, in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs, by reason of the premises, at the sum of thirty-two hundred and twenty-three & $\frac{11}{100}$ dollars over and above their costs and charges by him about his suit in this behalf expended, and for

24 those costs and charges the sum of one hundred and four & $\frac{63}{100}$ dollars. Therefore it is considered that the said plaintiffs recover against defendant their damages aforesaid, by the jurors aforesaid, in form aforesaid found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent, which said damages, costs, and charges in the whole amount to thirty-three hundred and twenty-seven & $\frac{74}{100}$ dollars.

Judgment signed this 10th day of March, 1877.

J. M. DEUEL,
Dep. Clerk.

3, 223	11
104	63
$3, 327	74

(Endorsed:) U. S. circuit court. J. W. Schulten et al. vs.

25 Lucretia Bronson, executrix, &c. Judgment roll. A. W. Griswold, pl'ffs' att'y. Filed M'ch 10, 1877.

26 UNITED STATES OF AMERICA, *ss:*

To John W. Schulten and Chauncy D. Hurd, and their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United Stated, to be holden at Washington, on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated July 25, 1878.

SAM'L BLATCHFORD.

27 (Indorsed:) U. S. Supreme Court. Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, plaintiff in error, against John W. Schulten & Chauncy D. Hurd, defendants in error. Citation. Stewart L. Woodford, att'y for pl'ff in error. U. S. circuit court, July 26, 1878, John I. Davenport clerk.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def'ts in Error.

July 26th, 1878.

(Indorsement on cover:) No. 107. Lucretia Bronson, as ex't'x of G. C. Bronson, dec'd, late collector, &c., plaintiff in error, vs. John W. Schulten and Chauncey D. Hurd. S. New York C. C. U. S. Filed 2nd December, 1878.

O

OFFICE SUPREME COURT U.S.
FILED
NOV 15 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

BRONSON, EXECUTRIX, &c.,
v.
SCHULTEN & HURD.
} No. 107.

BRIEF FOR THE PLAINTIFF IN ERROR.

[The thirteen cases within arise alike from an exaction of duties upon *charges* and *commissions*, as they are called; they also present no other questions of law than appear in the first one of them, No. 107.]

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

BRONSON, EXECUTRIX, &c.,
v.
SCHULTEN & HURD. } No. 107.

BRIEF FOR THE PLAINTIFF IN ERROR.

This was an action of assumpsit, laying damages at $3,000, brought by the defendants in error against a collector of customs, on the 2d of September, 1858 (folio 20), to recover money exacted for duties upon *charges* and *commissions* (folio 5) incident to the *purchase* and *transportation* of certain goods which subsequently were imported. After a plea of the *general issue*, on motion by the attorney for the plaintiffs, a verdict was entered for them, subject to adjustment by a referee, for the "*amount with interest, of the difference between duties levied and paid under protest on commissions at 2½ per cent., and such duties if levied on commissions at 2 per cent.,—on all importations,*" &c.; and a like verdict "*for any excess of duties levied and paid under protest, as specified in the bill of particulars, upon charges over and above those set forth in Exhibit D,*" &c. (folio 11).

A report having been made accordingly (folio 5), the plaintiffs, upon the 21st of March, 1860 (folio 6), recovered judgment.

Nearly seventeen years afterwards (December 27, 1876), the original attorney for the plaintiffs gave notice (folio 3) of a motion to open this judgment, together with several others of the same sort.

That motion was based upon an affidavit by himself (folio 4, &c.,) to the effect that, as to those cases in which his affidavit was entitled *other than the first fourteen* (an exception which included the present case, the *seventeenth* in that list)—

This deponent had no knowledge or suspicion that the adjustments were not made in accordance with the verdicts, or that items embraced in the bills of particulars had been omitted, until the recent adjustment of the cases of Chs. Payen *et al. vs.* Aug. Schell, Louis Grossman *et al. vs.* Heman J. Redfield, and William Loeschigk *et al. vs.* Heman J. Redfield, and certain other cases, when it was discovered that mistakes had been made in the adjustment of the case of Chs. Payen *vs.* Barney and L. Grossman *vs.* Shell, William Loeschigk *et al. vs.* G. C. Bronson, and other cases, the verdicts in which were similar to those in the cases hereinbefore named.

Upon readjusting the verdicts in these cases first above mentioned, it became necessary to examine the entries of the plaintiffs made to other collectors, and that disclosed the fact that omissions and mistakes had been made in the adjustments of these cases also by omitting items embraced in bills of particulars, and also because of their not having been adjusted according to the verdict, one having been adjusted upon the basis of Phillips' report only, without the modification of Treasury instructions of May 21, 1863, as provided in said verdicts, while as to the first twenty-two of said cases, the adjustments were not made according to Phillips' report, as provided in the verdicts given in said cases, and items were omitted.

Two other affidavits were filed at the same time (folio 8), and stated that the adjustments in question had generally been made under the direction of the collector or auditor of customs; and besides, they briefly confirmed that above, as to the existence of a discrepancy betwixt the preliminary verdicts and the adjustments.

Thereupon, after argument, upon the 26th of January, 1877, Judge Blatchford ordered the judgment of 1860 to be vacated, and the case to be again referred. Upon the 1st of March, 1877, the referee reported in favor of the plaintiffs for $3,223.11, beyond the amount awarded by the former judgment (folio 19), and for this, with costs, judgment was rendered upon the 10th of March, 1877 (folio 24).

The record does not show how much had been recovered under the original judgment of 1860.

The following errors are assigned:

1. The opening of the verdict and judgment; and

2. The rendering judgment finally for a sum greater than that claimed in the declaration.

1. It was error, under the circumstances, to open the original verdict and judgment.

The general rule of law forbidding a disturbance of verdicts and judgments after the close of the term at which they were rendered is elementary and familiar. See Cameron *v.* McRoberts (3 Wheat, 591); Sibbald *v.* The United States (12 Pet., 488); Bank *v.* Moss (6 How., 31); and McMicken *v.* Perin (18 How., 507).

Certain exceptions to that rule where the proceedings are null for *want of jurisdiction*, or for *fraud upon the court;* as also where they are affected by *irregularity*, or by *clerical errors*, or *mistake*, or are mere *office judgments* taken by default, are equally familiar.

It is not intended here to deny to these exceptions their reasonable scope of operation.

The present assignment of error raises a question as to only the *power* of the court below. It is admitted that if the judge had *power* to open, his *discretion* in exercising it is not subject to question here. But if the ground for his action appears upon the face of the record to be no one of those for which the law allows of it, the objection to such action is an objection for error in law.

The *circumstances* alluded to in this assignment of error are,—that what was done, was done not only after term ended, but after the lapse of nearly seventeen years; the *matter* relied upon for the application being one which either never was a *mistake* or anything else for which courts sometimes interfere summarily to rectify a judgment after term ended, or, if originally of that class of miscarriages, had by the time of this application to *open* become mere *laches*.

That *matter*, as stated in the principal affidavit, was the ignorance during nearly seventeen years of the plaintiffs' attorney, "*that the adjustments were not made in accordance with the verdict, or that items embraced in the bill of particulars had been omitted.*"

The upshot of this allegation is that the adjustment had not given to the plaintiffs the amount of money which the preliminary verdict, in principle, had directed, such *verdict*, of course, corresponding substantially, as

must have been implied by the affiant, with the *claim* in the plaintiffs' declaration. Therefore, the real matter complained of in the affidavit can be nothing else, in result, than that the adjustment had not given to the plaintiffs all that they had claimed, and that the plaintiffs' ignorance of this fact continued for many years after the satisfaction of the judgment.

That this was a *mistake*, and therefore deserving of summary remedy, seems to me to be legally an *absurdity*. How long time is to be allowed to a creditor plaintiff to find out whether the final adjustment of a verdict conforms in amount to the directions of the preliminary verdict; or whether the amount *adjusted* corresponds substantially with that for which he had *declared;* that is upon the whole, whether the court has awarded to him the amount to which he had been damaged, and for which he brought suit? The attorney says that he did not find this out for many years. Of course this state of ignorance is only important here upon supposition that it was shared in by the clients. If it were not so shared [the record states nothing as to that, except in the way of implication] the condition of the attorney's intelligence could lay no ground for such a motion, as it was very plainly the *clients'* duty to give him any information which they had. But if the clients, as may be assumed, were as ignorant, and as long ignorant, as their attorney, I submit that the record makes herein an exhibition of laches upon the part of litigants quite unique and preposterous.

With these general observations I proceed to submit that:—

a. This is not a question of *practice* within the act of June 1, 1872, or of any preceding act which allows or

requires the "practice" of United States courts to be conformed to that of the States within which they are held:

b. If, however, it be a question of *practice* as intended by the legislation aforesaid, it is one dependent upon the state of things which existed in 1860, when the original judgment was taken, and is unaffected by any words (especially if equivocal) in statutes passed subsequently to any point of time when by the previous law that judgment had become, in the full sense of the word, a finality:

c. The affidavits upon which the judgment of 1860 was opened do not make a case of *mistake*, or of anything else for which, in 1860, courts (*State* or *United States*) in New York had power to open judgments after term ended.

d. If the matter relied upon in the affidavits were originally *mistake*, or anything else that is relievable upon motion after term ended, it did not continue such at the time that the affidavits were filed or the motion was allowed.

a. This is not a question of *practice*, &c.

Practice concerns the *methods* and not the *objects* of court action. Whether the *object* be *in posse* is a question necessarily preliminary to that of the *method* of attaining it. Here the first *object* was to set aside an old judgment, the existence of which was completely obstructive of the importers' purpose of recovering other money from the United States. The question of the jurisdiction of the court over such judgment was one as to substantive *powers* thereof, as contradistinguished from *practice*, and therefore appears to be a matter unfit to be referred

to the standard of powers *exercised by State courts under State legislation, or to any standard now existing (and fluctuating) in State courts, under, suppose, some gradual departure during fifty years or so from those originally existing under their common law.* It would seem that neither express State legislation, nor State legislative acquiescence in peculiar views taken by State courts, in regard to the jurisdiction of the latter, can either extend or limit the original *powers* of United States courts.

Recent decisions in this court upon the act of 1872 illustrate this position.

In Nudd *v.* Burrows (91 U. S., 426), which decides that the manner in which a judge instructs a jury is neither *practice* nor *a form or mode of proceeding* within the act of 1872, the court says that the purpose of the act was "to bring about uniformity in the law of procedure in the Federal and State courts of the same locality; it had its origin in the code enactments of many of the States."

So in Indianapolis, &c., *v.* Horst (93 U. S., 291), the same principle is again laid down, the particular questions being, whether, upon application to the court, a party might not, in conformity with State legislation, require a verdict to be rendered in a special form; and whether, in contradiction to State legislation, applications for new trials in a Federal court continue to be applications to mere *discretion.*

See also case of Tobey *v.* Claflin (3 Sumner, 379), where upon a question of amendment of a record, it having been suggested that the court was bound by the authority of certain State decisions, Judge Story said: "As a matter of judicial duty I do not know that the practice of other courts not sitting under the authority of the general gov-

ernment ought to have any decisive weight here," and gave as a reason that the United States had legislated specially upon the subject.

b. If, however, the present question be one of *practice*, no statutes passed since the time, if any there be, at which, by virtue ot the law existing when it was rendered the judgment became a finality, will be allowed by equivocal words at least, to disturb rights *vested* because of such finality.

The words of the act of 1872 (chap. 225, sec. 5; Rev. Stat., sec. 914) are:

That the practice, pleadings, and forms and modes of procedure in civil causes, other than equity or admiralty causes in the circuit and district courts of the United States, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like cases in courts of record of the State within which said circuit or district courts are held, any rule of court to the contrary notwithstanding.

These words are, presumably, prospective only.

Two reported cases seem apposite in this immediate connection, viz: People *v.* Carnal (2 Seld., 463) and McCabe *v.* Emerson (6 Harris, Pa., 111). In these it was held that statutes which by general words allowed of writs of errors upon certain classes of judgments previously not liable thereto, did not extend to judgments already in existence. See also Sedge., Const. and Stat. Law, pp. 160, &c., and 643, &c.

c. The affidavits in this case do not disclose a case of *mistake*, or of anything else for which, in 1860, courts (*State* or *United States*) within New York had power to open judgments after term ended.

I have already submitted general remarks upon this topic.

[Chronic] "mistake" arising from [chronic] "ignorance" is what (upon the whole) the affidavit seems to rely upon. However, it sets forth the facts in detail, and the true question concerns *not* the *label* which the affiant has affixed to those facts, nor what *he* may have supposed that they amount to in view of law, but what in truth they did amount to.

The record shows that the plaintiffs conceived that in certain transactions with the United States about the year 1858 they had suffered wrong and loss: that they were roused thereby: laid their loss before a court: regarded themselves as indemnified by what they recovered: received their money, and presumably went their way to fresh fields and pastures new in business. Some years afterwards, their attorney, whilst prosecuting other suits for other parties, discovered that he had not fully exhausted the pasturage in *this* case, and that his clients had actually not been *satisfied*.

He thereupon duly made an affidavit.

I submit that *as no complaint is made of the referee*, or indeed of anything except the ignorance of this affiant, it sufficiently appears that the *mistake* was that of not producing before the referee evidence then in the affiant's power, and of the existence of which he had notice; evidence, I mean, of other importations and items of damage.

If this be "mistake" in the legal sense, and therefore a ground of remedy and recovery that remains unaffected by statutes of limitations or other contrivances in the interest of repose, after the original cause of action has under the general policy of the law been lost, is there not reason to apprehend that an incident (*laches*) which heretofore has been thought to be of great disad-

vantage to litigants and attorneys, may be converted into a powerful *weapon of offense*, so that in the end defendants who have received judicial absolution, and been bid to "go without day" may find that instead of being thereby *at peace* they have incurred the lot which in ancient rhyme has profanely been alleged to be that of all men *after marriage*, *i. e.*, "their trouble *begins*."

Compare this case with that of McMicken *v.* Perin (18 How., 507), cited above, which sufficiently represents a class of cases familiar to judges.

There a judgment *pro confesso* had been taken, and a reference for an account completed *without exception*, and also returned. At a subsequent term of court, the defendant moved to have the judgment set aside and the report corrected. Both applications were rejected.

Here, however, taught perhaps by McMicken's experience, the attorney who had occasioned the mishap resorts to an affidavit, in the course of which he denominates as "mistake" a detail of facts usual in the class of cases to which McMicken's belongs; and thereupon applies to have the reference and judgment set aside.

I submit that the record (affidavit) in this case either contradicts the conclusion which the attorney drew therefrom, or that the "mistake" which it indicates is nothing else in law than the mistake which in all cases of the McMicken sort a court can see upon the face of the record *without an affidavit* has been committed by either attorney or party. In view of what McMicken and his counsel came to think of their case in its latter stages-the allowing judgment *pro confesso* to be entered was cer, tainly a *mistake;* just as in the light which Griswold's researches in other cases came to throw upon certain

work done or omitted by him in Schulten's case, this latter was seen to be a mistake.

Practically, then, the whole difference betwixt that long list of cases in which courts have administered the old-fashioned justice exemplified in McMicken's case and the case now before the court is to be measured by the breadth of an affidavit by an attorney in the case in which a given state of facts is denoted *a mistake; i. e.*, such a mistake as appeals to a court for summary relief!

If this be a matter fit to be thus summarily relieved in face of a failure to come to one's self *before the referee*, and likewise *before the court* after the return of the report, it may possibly be as well to re-edit the old maxim about vigilantibus and dormientibus in the temper which in another department of thought has suggested that "not" be stricken from the *Commandments* and inserted in the *Creed*. The ultimate result would be to convert a satisfied judgment into a sort of "old man of the sea" of the Arabian Nights; and that the word "*actor*," which in law means *plaintiff*, and has heretofore conveyed the idea of a limited period of unusual activity and energy in pursuing some chose in action, will come to signify only one who never (or hardly ever) *has done with* a contention; one to whom a satisfied judgment is only a *power* in legal mechanics which at any moment can be roused into activity by the fuel of an affidavit, and afterwards by that other "inherent" *power* of courts over their own judgments—as it is somewhat largely denominated in New York, exercised with like generosity in *amending* the record—be converted into a perpetual menace of the security of such persons as have even once in their lives been defendants in a suit!

These remarks have been submitted without adverting to the peculiar traits which mark the present case, making it, in important particulars, so far as I can find, unprecedented. This matter will be presented in the next proposition, viz:

d. If the circumstance relied upon in the affidavits was originally a *mistake* it did not continue such at the time that the motion was allowed.

I submit that *mistake* turns upon *inadvertency*, and in the nature of things is a sort of intellectual *fit*, or brevis furor, which, in the interest of that *end of litigation* for which the law yearns, is allowed only a narrow scope, a scope which like that of *cooling time* in homicide, is matter of law; and which, although it may not be easy, speculatively, to draw the line that separates it from *laches*, presents no practical difficulty in cases where it is said, as here, [including all of these charges and commissions cases] to have endured for from *ten* to *seventeen* years.

In Barheydt *ad s.* Adams (1 Wend., 101), it appears that at October term, 1816, Adams had taken judgment by default against Barheydt upon an irregular notice of action; and also that at February term, 1827, upon motion by Adams, that judgment had been vacated, a record thereof not being filed, however, until May, 1828. Barheydt now moved to set aside the vacatur.

After referring briefly to the irregularities which had occurred as well upon the motion to vacate, as upon the original proceeding, Savage, C. J., added:

Besides, the plaintiff [Adams] having waited more than *five* years to apply for a vacatur of his judgment,

was not entitled to make that motion. The rights and responsibilities of the defendant had become irreversibly fixed, as a writ of error could not be brought. The defendant now before the court has therefore an interest in maintaining that judgment.

In Soulden *v.* Cook (4 Wend., 217), judgment had been taken by default at May term, 1820. At May term, 1830, the defendant moved to set aside the judgment on account of certain specified irregularities, making at the same time an affidavit of merits.

Sutherland, J., after other remarks upon the case, said:

There must be some limitation to applications of this nature, and the length of time which has elapsed in this case must estop the defendant. For the most manifest error apparent on the record, the defendant could not be relieved by writ of error, the time for bringing such writ having expired; and if for error apparent upon the record he is remediless, he cannot expect to have a judgment set aside for a less urgent cause. The motion is denied with costs.

The suggestion in these cases that ordinary *irregularities* must be remedied, at all events, *within* the time prescribed for the remedy of *errors* is according to analogy, and therefore reasonable; and it applies *a fortiori* in case of *mistakes* which, as I have submitted, must in the nature of things be transient.

In Harrison *v.* King (1 B. and Ald., 161), the declaration contained several counts (for *malicious charge of felony*, *malicious indictment*, *fraud*, *libel*, *slander*, &c.). Pleas, Not guilty, and, as to the *libel*, Justification; verdict, *generally*, for £1,500: Judgment accordingly, in January, 1810, and satisfied in 1811: Judgment reversed on error in Easter term, 1817, because one of the

counts in *slander* had not set forth the specific words. At Michaelmas term in same year (1817), the plaintiff moved to correct the record, and apply the verdict to the counts other than for slander, upon which last it appeared that no evidence had been given.

Lord Ellenborough said:

Although the plaintiff might have been permitted to indulge in sleep for a season, he should have been aroused by the writ of error. The moment the writ of error was brought, it was notice to a man who did not sleep the sleep of death.

If the writ of error was full notice *there*, unless the plaintiff were sleeping the sleep of death, what is to be said *here*, where *three distinct notices* may be traced, either of which would have aroused a man of ordinary vigilance: (1) the *report* of the referee; (2) the *judgment* of confirmation,—which were notices *to the attorney;* and (3) the amount offered in satisfaction of the injury for which suit had been brought, which constituted a notice *to the plaintiff*, not only plain but rude.

Two recent decisions in New York, in opposition to the views suggested by me upon this general topic, require to be considered:

Hatch *v.* The Central Bank (78 N. Y., 487), was an appeal from an order in the court below opening a former judgment. The case was, that upon the 5th of August, 1876, Hatch had obtained judgment against the bank for the value of four United States Treasury notes of $1,000 each, and interest, and this judgment had been paid August 7th. Upon the 5th of February, 1879, an order was made granting a motion to vacate this judgment,

and to amend the complaint by adding a claim for four other Treasury notes, which it was claimed had been omitted from the original complaint through mistake.

The following is the opinion of the Court of Appeals:

DANFORTH, J.:

The plaintiffs recovered judgment, and it was satisfied. They sought by motion to vacate the judgment, and amend the complaint by adding new causes of action. Leave was granted upon terms. So far as the causes of action were stated in the complaint they were merged in the judgment; the judgment was paid and satisfied. There was no longer a judgment, and the parties were out of court. It is urged by the appellant's counsel that the court had no power to allow the amendment; and the plaintiff's counsel contends that it was a matter within its discretion. It was going a great way to grant the relief sought; but the application was not without merit, and was one which under a long series of authorities the court had power to grant. If so, the order is not appealable. (Lawrence v. Farley, 73 N. Y., 187.) In the case of Minthorne (19 J. R., 244), after judgment and satisfaction, both were opened to allow an amendment by adding to the recovery. It was made necessary by the omissions of the clerk in assessing damages. So in Crookes *v.* Maxwell (6 Blatchf., 468), the court on motion of the plaintiff made in 1867, opened a judgment recovered in 1862 and then paid and satisfied of record, in order to permit errors in the assessment of damages to be corrected, and this was done, although after the judgment of 1862 a new suit had been commenced for the recovery of the sums so omitted, and the plaintiff defeated because of the statute of limitations.

In Dean *v.* O'Brien (13 Abb. Pr. R., 11), the plaintiff was allowed to amend by enlarging his cause of action, although he thus avoided the statute of limitations, and "it might affect third parties." These (and there are many other) cases show the power of the court over its

own judgments, and its habit to exercise it in aid of justice. It is an inherent power, and not limited in matters of substance by the sections of the code (section 174 of old code, section 724 of the new code), and others referred to by the learned counsel for the appellant, while section 723 seems to authorize its exercise in furtherance of justice.

In the case before us the summons claimed an amount corresponding to the sum of all the notes, while the complaint was for part only. The suit was commenced when the summons was served, and therefore no question arises here as to the statute of limitations; but even if it did, the precedents are numerous where amendments have been allowed so as to prevent its operation. Balcom *v.* Woodruff (7 Barb., 13), where after nonsuit an amendment was allowed *nunc pro tunc*, and in New York Ice Co. *v.* Northwestern Ins. Co. (23 N. Y., 357), the judgment was amended by giving leave to serve a new complaint, in place of dismissal without prejudice. The order in this case may go a little further, but it is in the same direction.

The appeal should therefore be dismissed, but without costs.

The other New York case referred to is Crookes *v.* Maxwell, Collector, &c. (6 Blatch., 468), cited by Judge Danforth above.

That was a case very much like the one now before the court, *i. e.*, an action to recover duties exacted upon Charges and Commissions.

In July, 1860, suit had been brought against the Collector to recover the moneys so exacted, and in September, 1862, a judgment had been recovered which, in October, 1862, had been satisfied. In April, 1863, another action had been commenced upon like grounds, and an *agreed case* was submitted to the court presenting a question upon the statute of limitations, the material

point therein being that the suit had been delayed under an impression occasioned by action of government officials, that in the event of a certain decision by the Secretary of the Treasury, all such claims would be paid without suit: and whether such dealing, &c., avoided the statute was the difficulty. At the trial in February, 1867, the judge thought the defence *unconscientious*, but, being pressed by the fact, held the matter over for further consideration.

Thereupon, on the 20th of February, 1867, a motion was made to *open* the judgment of September, 1862; whilst at a subsequent day in the term judgment was rendered on the verdict under consideration, in favor of the defendant.

Upon this motion Smalley, J., delivered the following opinion:

SMALLEY, J.:

The question arising in this case is whether the plaintiff is entitled to have the judgment in the suit commenced in 1860 opened, and to have the errors made in the assessment of damages therein corrected. The power of the court to open a judgment for the correction of such errors in the assessment of damages as are claimed to have been made in this case is not denied; and if it were, it is too well established, both in the State and Federal courts, to require authorities to sustain it.

It is claimed that the plaintiff has been guilty of *laches* in presenting and prosecuting this claim, and is therefore without redress, although the government, through its officers of the customs, has, in violation of law and against the decisions of the courts, extorted from him quite a large sum of money, which it has heretofore refused to refund. It should be borne in mind that all the invoices, entries, and other evidence to

prove these claims were in the custom-house, subject to the examination of and under the exclusive control of its officers, and only accessible to the plaintiff by special favor; and that the plaintiff had no reason to distrust the correctness of the custom-house adjustment of the 25th of September, 1862, at the time, although he had no knowledge when it was made. In looking into the matter, in January, 1863, he discovered some errors, and was then induced to make a further examination, in which he discovered many more, and in April, 1863, he commenced a second suit, when he should have moved to open the judgment in this one. Immediately upon an adverse termination of the second suit he made the present motion. By the bill of particulars filed in the second suit on the 13th of May, 1863, the defendant was appraised of the full extent and character of the plaintiff's claim, so that but a small interval of time had elapsed after the filing of the custom-house adjustment of September, 1862. Certainly the plaintiff's delay under the circumstances ought not to defeat or prejudice his legal and equitable right to the money wrongfully withheld from him.

I regret that the Government of the United States should resort to such a defense, and do not believe that, upon mature consideration, it will persist in it. If the suit were one between citizens only, a defendant would badly tarnish his reputation by insisting upon such a defense, and few lawyers would be willing to stand up in court and defend his cause.

It is ordered that the judgment rendered on the 30th of September, 1862, for the amount reported by the custom-house officers be vacated; that the order of reference made in the suit be revoked; and that the assessment of damages therein be referred to Kenneth G. White, esquire, United States commissioner, under the same rule as to notice and other questions thereto appertaining as was prescribed by this court in the case of Benkard *v.* Schell; and that, upon such assessment, the defendant be credited and allowed the amount paid on the 21st of October, 1862, as appears of record.

As will be seen Judge Smalley cites no authorities for his action.

The cases other than the last, that are cited in Judge Danforth's opinion above, require notice:

1. Mechanics' Bank *v.* Minthorne (19 Johns., 244).

There upon entering judgment on a promissory note at May term, 1821, the clerk had left out one year's interest. At October term, 1821 (August term having intervened), upon motion this clerical error was corrected.

As an authority for its action the court in Minthorne's case cited Wardell *v.* Eden (2 Johns. Cas., 121), where a judgment taken by Wardell in July, 1800, had been assigned by him for value, and afterwards was twice reassigned: In October, 1800, upon payment of a small sum of money to him by Eden, Wardell entered *satisfaction* upon the record: ~~In~~ , upon motion, the entry of satisfaction was stricken out, in order to protect the assignee, whom the court considered to be virtually the judgment creditor.

at Oct term 1800

The counsel who made the motion in Minthorne's case also cited the following cases:

(*a*) Bank *v.* Seymour & Smith (14 Johns., 219), where a judgment had been taken against Seymour at October, 1816, upon a warrant of attorney given by Seymour *& Smith;* and a motion to amend by inserting the name of Smith was allowed at May term, 1817, upon affidavit that the failure to enter his name at first was a mistake of the attorney's clerk.

(*b*) Lansing *v.* Lansing (18 Johns., 502), where judgment had been entered at January, 1820? against an executrix "*de bonis testatoris, et si non, de bonis propriis;*" and upon motion at October, 1821, this was amended by

adding to the word *goods* the words "and lands and tenements" of the executrix, upon the ground that a statute in New York had so changed the common law as to render lands and tenements subject to execution upon failure of goods and chattels; and that the error was *clerical.*

(*c*) Lee *v.* Curtis (17 Johns., 86). A verdict had been found for the plaintiff upon a plea of *non est factum*, subject, however, to the opinion of the court upon a point reserved; and the court being of opinion with the defendant, a verdict and judgment upon the plea had been entered for him. At a subsequent term (August, 1819) those entries were corrected, both parties agreeing, to a judgment of nonsuit.

(*d*) Burr *v.* Reeve (1 Johns., 507).

The clerk had assessed the damages erroneously (whether at that term or before does not appear), and, upon notice, this was corrected as an evident mistake.

(*e*) Seaman *v.* Drake (1 Caines, 9). At May, 1803, the court ordered the clerk to sign a judgment taken but not signed by him at October, 1801.

(*i*) Atterbury *v.* Teller (1 Caines, 495). Suit upon two notes, and judgment taken thereon irregularly, the amounts being assessed by the clerk and indorsed on each note, respectively. Afterwards, by agreement between the parties, the judgment was stricken out. A new suit having been brought, upon motion the court ordered the indorsements by the clerk to be stricken out.

(*k*) Close *v.* Gillespey (3 Johns., 526). Judgment had been taken (*when*, does not appear) under a warrant of attorney, but the plaintiff's attorney had neglected to have the plea by the defendant signed or filed, or the

name of defendant's attorney inserted on the roll. Upon motion these omissions were supplied, the court saying that an attorney was as much *an officer of the court* as the clerk.

2. The other cases cited in Hatch *v.* The Bank are (*a*) Lawrence *v.* Farley, where the Court of Appeals had said that the question of striking out a judgment by default, rendered in 1862, was still a matter of *discretion* up to "April, 1874" [or rather to a period somewhat anterior to that, not mentioned in the report]; (*b*) Balcom *v.* Woodruff, in which a judgment of nonsuit had been rendered, and motions for new trial and also for leave to amend were allowed [whether at same term that nonsuit was ordered does not appear], the court adding "under the peculiar circumstances of the case, and the case is not to be made a precedent"; and (*c*) Ice Company *v.* Insurance Company,—where judgment had been entered at December term, 1859, notice of motion to add a clause thereto given at February term following, and order granting leave at July afterwards. Remarking upon this the court said (23 N. Y., p. 361):

It is suggested in the opposing papers that the judgment had become perfect and final before the motion was made. I do not see the force of this suggestion. The judgment was perfect as soon as pronounced and entered. It would become final when the time for appealing should expire, but there is no pretense that this was ever limited by serving on the plaintiffs the notice required for that purpose (Code, § 332). I think the power of the court to modify or amend the judgment cannot be questioned. Even if the time for appealing had expired, I am by no means prepared to admit that this power would be lost. At all events, so long as the judgment was subject to an appeal it was subject to such corrections and modifications as the court which pronounced it might, in

its discretion, think proper to make. The administration of justice would be extremely imperfect if this power did not exist.

It is submitted that this string of cases (tracing those cited to their fountain-head) does by no means justify the amendments referred to in 78 New York, and that the other ground upon which that case is put, viz, that the court had no *power* to review, may rest upon something peculiar to the system of courts of the State of New York, and therefore is of no importance here.

The case in Blatchford is anomalous.

In 1863 the defendant did not pretend that his new cause of action had been covered by the former suit. He carried the second suit on for four years under the assertion that it was a new cause of action. (See Platner *v.* Best, 11 Johns., 530.) No affidavit in explanation or contradiction of this conduct appears, or probably could have been made, but the judge, hurried away, as it seems, by the *hardship* of the circumstances, snatched at any means of extricating the plaintiff, and falling into those "quicksands of the law" that proverbially attend "hard cases," succeeded in establishing what is perhaps the only precedent that exists for the judgment below in the present case.

In concluding, I have to repeat that it is admitted that if by lapse of time "*mistake per se* does not necessarily degenerate into *laches* (as it may be that such lapse unaccompanied by subsequent notice and acquiescene, does not affect such irregularities as concern judgments by default and judgments taken without due service of process, and some other irregularities to be found in the books), the circumstances presented under this head are

not reviewable in this court inasmuch as they were *within the discretion of the circuit court.*

I have referred to all the authorities cited by the counsel who appeared upon both sides in Hatch's case, and submit that not one of them bears upon the proposition last stated above. And in that case all that the Court of Appeals are pledged to is, that *they* could not see, as matter of law, that an inadvertence of counsel continued for less than three years, was *laches.* And in the mean time no suggestions seem to have been actually made, or to have occurred to the court upon the present topic. Here, however, the *mistake* of counsel (continued after what amounted to repeated notice, and then communicated to the client *with similar notice*) had remained uncorrected for five times the number of years covered by Hatch's case. Is there, then, as matter of law, no boundary of this sort betwixt *laches* and *mistake?* And if there be such boundary, why may it not be drawn, with reference to the analogous matters presented by writs of error, which in courts of the United States would limit such applications for summary relief to *two* years.

2. The second assignment of error turns upon the very simple matter of *a judgment for an amount in excess of the writ and declaration.*

Upon this I will only cite Cox *v.* the United States (6 Pet., 172); Mills *v.* Scott (99 U. S., 25); Tidd, pp. 869, &c., and the New York cases, Curtiss *v.* Livermore (17 Johns., 110); Dox *v.* Dey (3 Wend., 356); Corning *v.* Corning (2 Selden, 97); Coulter *v.* Express Co. (5 Landing, 67); Bowman *v.* Earle (3 Duer, 691); McIntyre *v.* Clark (7 Wend., 330).

Referring to the course taken in Mills *v.* Scott, just

cited, I submit not only that the discrepancy between the declaration and judgment has here been *duly assigned* for error, but also that after what has already passed in the way of lapse of time and assistance by the court, no further aid should be extended. The writ in the present case was sued out twenty-three years ago, upon the 2d day of last September.

I trust that it will turn out to be *entirely superfluous* upon my part to have asked, as I now do, that in case the courts allow of a remission of the surplus, the plaintiffs be required to account for what they recovered previously under the same declaration, the amount of which has not been sent up in this record, but, as I am informed by a certificate of the clerk below, will be seen by the court there to be $765.69.

S. F. PHILLIPS,
Solicitor-General.

BRONSON, EXECUTRIX, &c.,
v.
LOESCHIGK AND OTHERS. } No. 108.

Assumpsit, brought October 12, 1859 (folio 19); *Damages*, $1,000 (folio 20); and *Original Judgment*, April 9, 1861 (folio 6), *satisfied* (folio 5). Affidavits to open, *as in No.* 107, December 27, 1876 (folio 6, &c.). Motion granted January, 1877 (folio 12). Final judgment March, 1877, $5,674.74 (folio 22).

Both assignments of error, and the argument in No. 107 *are relied upon in this case.*

SCHELL, LATE COLLECTOR, &c.,
v.
DODGE AND OTHERS. } No. 109.

Assumpsit, brought in April, 1864; *Damages*, $1,800; plea, *general issue.* Folios 3, 7, and 8.

Reference, March, 1875 (folio 24).

Report, January, 1877 (folio 28).

Verdict, $17,257.93 (folio 33).

Judgment, January, 1877, $17,257.93 (folio 9).

The second assignment of error and argument in No. 107 *are relied upon here.*

SCHELL, LATE COLLECTOR,
v.
SHERMAN AND OTHERS. } No. 110.

Assumpsit, brought in 1863; *Damages*, $1,950; plea, *general issue*. Folios 3 and 6.

Verdict, by consent, subject to adjustment, December, 1870. Folio 10.

Adjustment, December, 1876. Folio 12.

Judgment, December, 1876. $33,938.26.

The second assignment of error and argument, are relied upon here.

SCHELL, LATE COLLECTOR,
v.
ELLERY AND OTHERS. } No. 111.

Assumpsit, brought October, 1863; *Damages*, $1,700; plea, *general issue*. Folios 3 and 6.

Reference, March, 1875. Folio 10.

Report, October, 1876, $3,472.61. Folio 13.

Finding accordingly by the court, October, 1876. Folio 15.

Judgment for $3,472.61, October, 1876.

The second assignment of error and argument in No. 107 *are relied upon here.*

SCHELL, COLLECTOR, &c.,
v.
WARBURG & GOETZ. } No. 112.

Assumpsit, brought November, 1862 (folio 18); *Damages*, $5,000 (folio 21); *Original judgment*, April, 1865 (folio 6);

Affidavits to open, and Order, *as in No.* 107, December, 1876, and January, 1877 (folios 5 and 12).

The first assignment of error and argument in No. 107 *are relied upon here.*

SCHELL, COLLECTOR, &c.,
v.
GROSSMAN. } No. 113.

Assumpsit, brought April 1, 1863 (folio 18); *Damages*, $2,000 (folio 22); *Original judgment*, February 7, 1866 (folio 6); satisfied (folio —); *Affidavits* to open, and *Order*, *as in No.* 107, December, 1876, and January, 1877 (folios 6 and 13); *Final judgment*, $808.25 (folio 26).

The first assignment of error and argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX, &c.,
v.
SHERMAN AND OTHERS. } No. 115.

Assumpsit, brought November 24, 1863 (folio 3); *Damages*, $1,900 (folio 4, &c.); *Judgment*, $34,278.22, December, 1876 (folio 7).

The second assignment of error and argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX, &c.,
v.
LA CHAISE & FANCHÉ. } No. 116.

Assumpsit, brought November 1, 1859 (folio 19); *Damages*, $3,000 (folio 22); *Original judgment* June 10, 1864

(folio 7), *Satisfied* (folio 6); *Affidavits* to open and *Order*, as in No. 107; December, 1876, and January, 1877 (folios 6 and 13); *Final judgment*, $1,309.78 (folio 16).

The first assignment of error and argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX OF COLLECTOR,
v.
LOESCHIGK AND OTHERS. } No. 117.

Assumpsit, brought in November, 1863, *damages*, $1,600; plea, *general issue*. Folios 4 and 8.

Verdict, by consent, subject to adjustment; *adjustment*; $22,923.95. Folios 11 and 14.

Judgment, December, 1876, for $22,923.95. Folio 9.

The second assignment of error and argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX, &c.,
v.
MITCHELL AND OTHERS. } No. 118.

Assumpsit, brought April 5, 1862 (folio 17); *Damages*, $5,000 (folio 19); *Original judgment* February 13, 1864 (folio 7), *Satisfied* (folio 6); *Affidavits* to open and *Order*, as in No. 107; December, 1876, and January, 1877 (folios 6 and 13); *Final judgment*, $7,619.64 (folio 24).

Both assignments of error and the argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX OF COLLECTOR,
v.
WILSON & BROWN. } No. 119.

Assumpsit begun in November, 1863, *damages*, $1,900; plea, *general issue*. Folios 4 and 6.

Verdict, by consent (April, 1864), subject to adjustment by the clerk; *Adjustment*, October, 1876. Folios 9 and 12.

Judgment, November, 1876, $2,369.77. Folio 8.

The second assignment of error and argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX OF COLLECTOR,
v.
ANDREA, &c. } No. 120.

Assumpsit, brought in September, 1860, *damages*, $2,000; plea, *general issue*. Folios 4 and 6.

Reference, December 4, 1874, and *report*, October 1876. Folios 8 and 11.

Verdict. Folio 15.

Judgment, $4,438.17, October, 1876. Folio 7.

The second assignment of error and argument in No. 107 *are relied upon here.*

REDFIELD, EXECUTRIX, &c.,
v.
THEIROTT. } No. 121.

Assumpsit, brought in October, 1860, *damages*, $2,000; plea, *general issue*. Folios 4, 7, and 8.

Reference, December, 1874, and *report*, October, 1876. Folios 10 and 15. *Verdict*, October, 1876. Folio 17. *Judgment*, $3,571.17, October, 1876. Folio 9.

The second assignment of error and argument in No. 107 *are relied upon here.*

S. F. PHILLIPS,
Solicitor-General.

IN THE

Supreme Court of the United States

No. 107.

LUCRETIA BRONSON, EXECUTRIX, &c.,

vs.

JOHN W. SCHULTEN ET AL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 107.

LUCRETIA BRONSON, EXECUTRIX, &c.,

vs.

JOHN W. SCHULTEN ET AL.

POINTS FOR DEFENDANT IN ERROR.

As every element of the "adjustment" or computation requisite to make up the exact amount of the judgment is absolutely fixed by the verdict, so that all that was left to be done was to compute the differences named in the verdict upon the items in the bill of particulars, therefore the making up of the amount of the judgment was a mere clerical or ministerial act or computation; and an error in such computation or making up is a mistake of fact or a misprision of the accountant, charged, by the court, with a matter of mere computation.

The following cases bear upon the matter as to what is the *kind* of mistakes that come within the court's power of amendment at subsequent terms.

In U. S. *v.* Bank, 15 Pet., 401, the court defines the mistakes which a succeeding officer may correct in the *res judicata* of a predecessor as follows:

"The right of an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact aris-

ing from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced."

In Cannon *v.* Reynolds, 5 Ellis & Bl., 301, (85 Com. L. R., 300,) the mistake was that plaintiffs had put items of an act, which ought to have been sued against A & B, into an action *vs.* A & C, and the court opened the default judgment *vs.* A & B, and suffered the amendment. This on plaintiff's motion. In this case judgment *vs.* A & B was rendered by default 16th January, 1855, (85 Com. L., 300,) for £166 12 s. 6 d., and this was paid. And the motion to open up the judgment was 26th of April.

In United States *v.* Fearson, 5 Cr. C. C., 95, at a subsequent term a judgment by confession was corrected, because it was for too large a sum.

In Atkins *v.* Sawyer, 1 Pick., 351, the mistake was in entering a judgment *vs.* Administrator, when it should have been against the goods of intestate. The judgment could be set right by *other parts* of the record, and the amendment was made.

In Bacon *v.* Lincoln, 2 Cush., 124, Shaw, Chief Justice, allowed amendment of a judgment on petition at a subsequent term, where the mistake was that the judgment, as recorded, was for wrong amount, but the right amount was minuted on the execution and on the clerk's docket.

In Dodge *v.* Chandler, 13 Minn., 114, the mistake was that the judgment in replevin called for too large a sum of money to be paid in default of the return of the property, and the court held that, as the true sum could be determined from mere computation made from the papers in the case, the judgment might be opened and amended. (See also 13 Minn., 291.)

In Ingram *v.* Robbins, 33 N. Y., 409, the mistake was that of the attorney, employed to enter up judgment by confession, filing an insufficient "statement" and verifica-

tion; and the Court of Appeals held that the court below ought to have allowed amendment of judgment.

In Smith *v.* Hood, 25 Pa. St. R., 218, the mistake was the entry of judgment on warrant of attorney for *too small* a sum, and the court held that even after execution issued and levied the court could order the judgment to be amended where no prejudice was brought to third person.

In Trott *v.* Wheaton, 5 R. I., 353, a judgment was rendered by error of calculation for *too small* an amount, and the court opened the judgment and corrected the amount. This was done under power reserved by agreement.

In Patton *v.* Massey, 2 Hill (S. C.), 475, the mistake was that of the clerk in entering judgment; he entered it for less than was due, and the judgment was corrected after the erroneous first judgment had been made on execution.

In Peaslee *v.* Barney, 1 D. Chipman (Vt.), 331, the negligence of the clerk caused an omission from a decree which could be corrected by the examination of the files; and the court ordered the correction.

In Snead *v.* Coleman, 7 Gratt. (Va.), 300, the court held that a default judgment, where the mistake was the clerical one of entering it against an administrator *de bonis propries*, ought to be opened and corrected on motion in the court where it was entered.

Miss. R. R. Co. *v.* Wynne, 42 Miss., 315, holds that errors of mere fact may be corrected even in appellate court, after expiration of the term.

In Mechanics' Bank *v.* Minthone, 19 Johns., 244, the mistake was that of the clerk in miscalculating the interest by omitting one year; and after the elapse of the term, and after the judgment was satisfied, the court ordered this judgment to be amended and the satisfaction to be set aside.

In Mellish *v.* Richardson, 7 Barn. & Cress., 819, the mistake was a "slip of the clerk" (14 Com. L., 366; 85 Com. L. R., 302) in entering *general* verdict on a declara-

ing from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced."

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tion; and the Court of Appeals held that the court below ought to have allowed amendment of judgment.

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tion having bad and good counts. The judgment was amended by applying verdict and judgment for plaintiff to the first count, and this was done after judgment had been reversed by the King's Bench.

In Bank *v.* Wiston, 3 Pet., 431, a judgment was entered and mandate issued at the January Term, 1829, (2 Pet., 318,) omiting all interest on the judgment affirmed.

At the January Term, 1830, this court, after argument, reformed the judgment and allowed interest, on the ground that the omission was a "*clerical mistake.*"

This court in *Ex parte* Sibbald, 12 Pet., 491, enunciates "*clerical mistakes*" as one class where courts on motion at a succeeding term may set aside a judgment, but gives no light on what is a "clerical mistake."

Again, this court in Bank *v.* Moss, 6 How., 38, says:

"We would not be understood by this to deprive a court at a subsequent term of power to set right mere forms in its judgments. (3 Wheat., 591; 3 Pet., 431; 12 Wheat., 10; Lawrence *v.* Cornell, 4 Johns. Chan. Cas., 542.) *Or the power to correct misprisions of its clerks.* (The Palymra, 12 Wheat., 10; Hammer *v.* McConnel, 2 O., 32; 1 Greenl., 375; Com. Dig., Amendment T., 1.)

"*The right to correct mere clerical errors so as to conform the record to the truth always remains.* (12 Pet., 492; 2 Wash. C. C., 433; 6 Watts, 513; 8 Ib., 424; 1 Wend., 101; 4 Ib., 217; 1 Bibb, 324; 2 Ib., 88; 11 Mass., 417; 3 Pet.)

"*Indeed, any amendments permissible under the statutes of Joefails may be proper at a subsequent term.*"

Court's Inherent Power Over Mistakes in Judgments.

The foregoing cases are referred to, mainly, as illustrating *what kind* of mistakes and errors may be relied on as a ground for opening and correcting judgments at a subsequent term. But it will be seen that most of them are

authorities upon the main and direct point on which these cases turn, and which we now state, to wit:

Where, as in these cases, the verdict fixes the exact elements by which the amount of the judgment is ascertainable, and said amount is left blank, and is by the court ordered to be ascertained by a designated person, as the agent of the court, and the amount is afterwards, through mistake in mere accounting, *erroneously* ascertained and entered, there such erroneous ascertainment and entry may, on motion, be corrected by order of the court.

Crooks *v.* Maxwell, 6 Blatch., 468, is a case in every material particular, both as to facts and law, like the present. It was decided in the same court, at the same day with some of these cases, to wit, on 30th September, 1862, and the motion to open up was made 20th February, 1867, on the same ground as in these eases, to wit, clerical error in making up the amount of damages under the verdict.

The court allowed the motion.

If this case can be sustained as good law, it is of course the end of the present discussion.

In Hatch *v.* Bank, 78 N. Y., 487, unanimously decided in 1879, this case of Crooks *v.* Maxwell is expressly approved. That case (Hatch *v.* Bank) is one where, in the original judgment, plaintiff recovered for what he had paid for four counterfeit bonds of $1,000 each, purchased 28th September, 1867, which judgment was recovered 5th August, 1876, and was paid off upon the 7th of August, 1876. On the 5th February, 1879, the court granted a motion of plaintiff, allowing him to amend his declaration by adding the amount paid for four *other* counterfeit bonds purchased by plaintiff of defendant on 25th of September, 1867, and which were omitted from the original complaint by mistake.

The court, in this case, did not consider whether the

power of the court below, in granting this motion, was *wisely exercised*, but did consider, upon a very full presentation of the authorities on both sides, whether said *power or jurisdiction existed;* and the court was unanimous in holding that it did. The court uses these words regarding the existence of said power:

"The application was not without merit, and was one which. *under a long series of authorities, the court had power to grant.*"

The court then cites Lawrence *v.* Tarley, 73 N. Y., 187; Minthorne *v.* Mechanics' Bank, 19 Johns., 244; New York Ice Co. *v.* Ins. Co., 23 N. Y., 357; Crooks *v.* Maxwell, 6 Blatch., 468; Balcerne *v.* Woodruff, 7 Barb., 13; Deane *v.* O'Brien, 13 Abb. Pr. R., 11. And the court does not find this power to be one derived from the New York Code; but, on the contrary, says, expressly, "it is an *inherent power* and not limited in matters of substance by the sections of the code, (sec. 174 of the old code and sec. 724 of the new code,) and others, referred to by the learned counsel for the appellant, while section 723 seems to authorize its exercise in furtherance of justice."

If this case is good law, it is, of course, one conclusive of the present cases.

In the case of Cannan *v.* Reynolds, 5 Ellis & Bl., 301, (85 Com. L. R., 300,) opinions were delivered by Lord Campbell and by Coleridge and Crompton, decided in 1865.

We have above stated the leading facts of this case, and simply desire here to note some additional features.

Precisely as said in the case of Minthorne, 19 Johns, *supra*, so here, the judge says, (p. 302,) speaking of the grounds on which rests the court's power to corrects its judgments—"*mistake is a ground of relief in equity as well as fraud.*" See also p. 305. Observe also that the court is careful to say that they did not base their order, in that

case, upon the "Procedure acts," but upon the "*general equitable power of the court over its judgments.*"

We beg, also, to call special attention to what is said, at the conclusion of Lord Campbell's opinion regarding the *effect of the lapse of time* upon the power of courts over judgments. He says: "We are asked what are the limits of our jurisdiction, and whether we could do this at any time. *I answer that the lapse of time becomes, after a season, a bar as soon as the court,* IN ITS DISCRETION, *sees that it has been such as must work prejudice.*"

In all three of the opinions it will be seen that the judges find this *power to be one inherent in the courts to correct such mistakes in furtherance of justice; and that the power is one resting in the discretion of the courts.*

In Matheson's Administrator *v.* Grant's Administrator, 2 How., 284, this court expressly decided the same thing regarding the power of the courts over their judgments being of a discretionary class. At *one* term was a verdict, the allowance of a motion in arrest of judgment on the verdict, but no entry of the said order. At the *second term following* said term the court, on motion, vacated said order arresting judgment, allowed the *nolle* of a repugnant count, suffered verdict to be entered on the *other* count, to which the evidence was applicable, and directed a judgment on the verdict *nunc pro tunc.* This was held to be authorized by the thirty-second section of the judiciary act, which this court says gives to the Federal courts powers of amendment "*quite as broad, to say the least, as is possessed by any other courts in England or America,* and is upheld upon principles of the soundest protective public policy."

The court then proceeds to review this power of amendment as it is in England, and then adds the following (p. 284):

"There is yet another view of this matter. The question of the amendment was a question of discretion *in the court below upon its own review of the facts in evidence, and we know*

of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon survey of the facts, which seem to us to have belonged appropriately and exclusively to that court."

Since our employment in these cases there has not been time to go over more fully than we above do what we deem the controlling questions in the cases. And this is our apology for the defects of this brief—defects which will be rendered unimportant by the full and able brief of the attorney of record for the defendants in error.

SHELLABARGER & WILSON,
Of Counsel for Defendants in Error.

In the Supreme Court of the United States.

No. 107.

LUCRETIA BRONSON, Executrix, &c.,

vs.

JOHN W. SCHULTEN et al.,

and Eight other Cases.

A. W. GRISWOLD,
Attorney for Defendants in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States

No. 107.

LUCRETIA BRONSON, EXECUTRIX,

vs.

JOHN W. SCHULTEN ET AL.

BRIEF FOR DEFENDANTS IN ERROR ON PLAINTIFF'S FIRST ASSIGNMENT OF ERROR.

Assumpsit, for excess of duties paid on charges and commissions.

STATEMENT.

September 2, 1858, suit commenced in New York Superior Court.

September 22, 1858, cause removed by writ of certiorari to the U. S. Circuit Court. (Folio 20.)

Thereafter the plaintiffs below filed in the U. S. Circuit Court their "Narr" containing the common money counts, claiming that on November 1, 1853, the defendant below was indebted to the plaintiffs in the sum of $3,000. (Folio 20.) Said plaintiffs also filed their bill of particulars. (Folio 11.) Plea, general issue. (Folio 22.)

On January 26, 1860, the cause was tried and a verdict ordered for the plaintiffs (below) subject to *adjustment by* Samuel Ogden, Jr., (auditor in the New York custom-

house) as referee, for the "amount, with interest, of the difference between duties levied and paid under protest on commissions at 2½ per cent., and such duties if levied on commissions at 2 per cent., on all *importations specified in the bill of particulars in this case* from Sweden &c., &c., France (except Paris), &c., &c. * * * and a like verdict * * for excess of duties * * * upon charges over and above those set forth in exhibit D, being the report of Isaac Phillips, appraiser. * * * (Folio 11.)

March 21, 1860, judgment having been entered, was paid and satisfied. (Folio 6.)

The form of verdict in No. 108, Bronson, executrix, *v.* Laeschigk et al., is similar to the above, except the reference is made to the "collector" as referee. (Folio 11 of record in 108.)

The verdicts in cases Nos. 112, 113, 116, and 118 differ from the above, in that they appear to have been taken "by consent of counsel." (Folios 10–12.)

The referee, to whom was committed by the court the duty of computing the amount due the plaintiffs (below) in each case according to the rule laid down in the verdict, performed his task, and reported an amount in each case, upon which judgments were entered, and subsequently paid and satisfied of record.

It was subsequently discovered that grave errors had been made by the referees in adjusting these verdicts, by which they had reported amounts less than the correct amount due according to the verdict.

Whereupon the plaintiffs below, on December 27, 1876, gave notice of a motion, upon affidavits annexed, to open the judgments and send the cases to a referee to ascertain and adjust the amounts due the plaintiffs under the verdicts in each case. (Folio 4.)

On January 26, 1877, the Circuit Court made an order that the judgments entered, &c., be vacated, and that the assessments of the plaintiffs' damages under the verdicts in said cases be referred to John I. Davenport, Esq., as sole referee.

"*And it is ordered that the referee proceed to adjust de novo the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases respectively*, and that he report the balance, if any, found due the plaintiffs [below] in each of said causes. (Folio 12.) Said referee shall give notice * * of the time and place of hearing, and either party may on the hearing raise objections, and said referee shall decide thereon, and either party may file exceptions to the referee's decision, &c., &c., and bring them to a hearing before the court upon four days' notice." (Folio 13.)

In the case of Bronson's Exec. *v.* Schulton *et al.* the referee, John I. Davenport, reported on March 1, 1877, that he had been attended by counsel for the respective parties, and taken and examined the testimony offered in support of the plaintiffs' [below] claim, and found that, under the verdict in said case, there is now due the plaintiffs herein from the defendant, as collector, * * * as and for duties on charges and commissions, beyond the amount awarded therefor, the said former report, the sum of $1,205.90 in gold and silver coin, principal, $2,017.21 interest, amounting to $3,223.11. (Folios 18, 19.)

On March 10, 1877, judgment was docketed for that sum, with costs. (Folio 24.)

The writ of error was sued out July 26, 1878. (Folio 1.)

The plaintiffs in error deny the power of the court to open the judgments. The defendant's

FIRST POINT IS.

It having been made to appear to the satisfaction of the court below that errors had been committed by the referee in computing, adjusting, and reporting the amount due the plaintiffs under the verdict, by reason of which a judgment was signed for an amount materially less than was due, that court had the power, after payment and satisfaction of the judgment, to open it, and order a *readjustment of the verdict in accordance with its terms and provisions* as originally entered. (Mechanics' Bank *v.* Minthorne, 19 Johns., 244; Crookes *v.* Maxwell, 6 Blatch., 468.)

The facts and circumstances of the six cases at bar are so nearly identical with those in the case of Crookes *v.* Maxwell that I desire to call the attention of the court especially to that case as giving a clear and comprehensive statement of those facts and circumstances which the records alone do not so fully disclose—facts and circumstances so often brought to the attention of the court below, (having exclusive jurisdiction of such cases,) that it may be said that that court—the U. S. Circuit Court of New York—came to have "judicial knowledge" of them.

It appears from the agreed statement of facts in the case of Crookes *v.* Maxwell, 6 Blatch., 470–71, that the action was brought on July 6, 1860, to recover excess of duty paid on "sea freight and transhipment charges, *and on April* 23, 1861, *a verdict was had for the plaintiffs, and by an order of the court the case was referred to the collector for adjustment, according to the usual practice at the time*," *and on the* 25*th of September*, 1862, (a year and five months after the case was referred to him,) the collector made a report to the clerk *of this court, of which the following is a copy:*

"United States Circuit Court.

SEPTIMUS CROOKES
v.
HUGH MAXWELL.

CUSTOM-HOUSE, NEW YORK,
COLLECTOR'S OFFICE, *September* 25, 1862.

SIR: *The verdict in the above-entitled case, as adjusted in this office, with interest to the 24th inst., amounts to the sum of* $4,934.13.

Respectfully yours, C. P. CLINCH,
Dep'y Coll'r.

To KENNETH G. WHITE, *Esq.*,
Clerk of the U. S. Circuit Court, Southern Dist. of N. Y.

And that the plaintiff, relying on the truth of this report, judgment was entered upon it September 30, 1862, for $4,934.13 damages, and $54.95 costs, making a total of $4,989.08, which judgment was paid and satisfied of record October 21, 1862.

It is further agreed that neither the plaintiff nor his attorney was consulted or advised with by the collector, or by the person employed by him in making said adjustment, nor had they any knowledge or suspicion that said adjustment was not correct, or that any items had been omitted, till some time in January, 1863, when it was discovered accidentally that a few items had been omitted, the extent of which was not ascertained till some time in April, 1863."

In April, 1863, another action was brought to recover the items omitted by the collector in the adjustment of the verdict in the first. To this second action the defendant interposed the plea of the statute of limitations; and in February, 1867, this second cause was tried, and the defendant's plea of the statute was held good, and judgment for the defendant was had. Whereupon the plaintiff, on February 20, 1867, made his motion to set aside the original judgment signed September 30, 1862.

"SMALLEY, J.—The question arising in this case is whether the plaintiff is entitled to have the judgment in the suit

commenced in 1860 opened, and to have the errors made in the assessment of damages therein corrected.

"The power of the court to open a judgment for the correction of such errors in the assessment of damages as are claimed to have been made in this case is not denied; and if it were, it is too well established, both in the State and Federal courts, to require authorities to sustain it.

"It is claimed that the plaintiff has been guilty of *laches* in presenting and prosecuting this claim, and is, therefore, without redress, although the Government, through its officers of the customs, has, in violation of law and against the decisions of the courts, extorted from him quite a large sum of money, which it has heretofore refused to refund. *It should be borne in mind that all the invoices, entries, and other evidence to prove these claims were in the custom-house subject to the examination of, and under the exclusive control of, its officers, and only accessible to the plaintiff by special favor; and that the plaintiff had no reason to distrust the correctness of the custom-house adjustment of the 25th of September*, 1862, *at the time, although he had no knowledge when it was made.* In looking into the matter in January, 1863, he discovered some errors, and was then induced to make a further examination, in which he discovered many more, and in April, 1863, he commenced a second suit, when he should have moved to open the judgment in this one.

"Immediately upon an adverse termination of the second suit he made the present motion.

"By the bill of particulars filed in the second suit on the 13th of May, 1863, the defendant was apprised of the full extent and character of the plaintiff's claim, so that but a small interval of time had elapsed after the filing of the custom-house adjustment of September, 1862. Certainly the plaintiff's delay under the circumstances ought not to defeat or prejudice his legal and equitable right to the money wrongfully withheld from him."

The verdicts in the six cases at bar were taken, and the judgments rendered thereon were satisfied and paid on the following dates, viz.:

In No. 107, verdict January 26, 1860 (folio 11 of record); judgment paid March 21, 1860 (folio 6).

In No. 108, verdict April 23, 1860 (folio 11); judgment paid April 9, 1861 (folio 6), a year after verdict.

In No. 112, verdict April 10, 1863 (folio 11); judgment paid August 18, 1865 (folio 6), two years and four months after verdict.

In No. 113, verdict April 10, 1863 (folio 11); judgment paid February 7, 1866 (folio 6), two years and ten months after verdict.

In No. 116, verdict May 2, 1861 (folio 12); judgment paid June 10, 1864 (folio 7), three years and one month after verdict.

In No. 118, verdict June 9, 1862 (folio 12); judgment paid February 13, 1864 (folio 7), two years and one month after verdict.

Allowing a month from the date of the report and entry of judgment to date of payment, as shown in the case of Crookes *v.* Maxwell, we have above the time taken by the collector in which to adjust the several verdicts ranging from one month to three years, showing that he considered himself quite independent of counsel, and made his adjustments and reports at his pleasure.

It will be seen that the verdicts taken in these six cases cover the same period as the verdict in the case of Crookes *v.* Maxwell, and it is fair to presume that the facts in these cases, and the proceedings of the referee were the same or similar to those detailed in Crookes *v.* Maxwell.

It is apparent to every one that the collector (the referee) in that case considered his duties purely *ministerial*, simply to compute the amount due the plaintiffs. According to the rules laid down in the verdict, the calculations were simply *arithmetical.* The court selected the *collector* as referee evidently for two reasons:

1st. Because the papers—the plaintiffs' invoices and entries—which formed the basis of his claim were all in the

custody of the collector at the custom-house, and accessible to *him* and his clerks, which would obviate the necessity of removing them from the custom-house to the office of any other referee.

2d. Because the court assumed that the collector, with his clerks, who were accustomed to assessing duties, to reducing the value of the various foreign currencies in which invoices are made to our own, were probably better qualified to make this computation than one not having had such experience.

The reference was accordingly made to the collector.

It was a service in the performance of which the collector needed no advice; hence he asked and received none, as the facts show.

That he considered himself *exclusively an officer of the court* is apparent from his report, made to the clerk September 25, 1862:

"SIR: The verdict in the above-entitled case, as adjusted in this office, with interest to the 24th instant, amounts to the sum of $4,934.13.

"Respectfully yours,

C. P. CLINCH, *Deputy Collector.*

"To KENNETH G. WHITE, *Clerk, &c.*"

See 6 Blatch., 471.

He does not say he has been attended by counsel for the respective parties. But the facts show that the plaintiff at least did not know *when* the adjustment was made, and of course had no opportunity to know how it was made.

When the plaintiff below learned *from the clerk of the court* that the collector had reported the *amount*, he knew the work of adjustment had been done *some time* between April 23, 1861, (the date of the verdict and reference,) and September 25, 1862, the date of the report.

It will be seen that the report gave no details, made no reference to the bill of particulars referred to in the ver-

dict—in fact, disclosed no basis of adjustment, and gave no details from which the plaintiffs could form any suspicion that it did not embrace their whole claim.

But the plaintiffs below believing the adjustment of their verdict had been made by the collector with the same care as duties were assessed for the collection of the revenue, they came to rely on the collector's reports of amounts found due as "officially correct," and in that belief they entered judgment for the amount which the collector reported to the clerk of the court was due.

The errors, which the court below ordered to be corrected, were made by the referee, who was as much an officer of the court as was the clerk in the case of Mechanics' Bank *v.* Minthorne, already cited. There the clerk made a mistake in the computation of interest on a promissory note, by reason of which judgment was entered for an amount less than was due. After judgment was paid and satisfied, the plaintiff discovered the error and applied to the court to set aside the judgment, which was done.

The court said: "We have no doubt of our power to set aside the satisfaction entered, as well when there is a clear mistake as in case of fraud. Here is a clear and acknowledged mistake of the clerk of this court. We interfere in such a case to do equity."

The courts have gone much further in other cases than they did in Mechanics' Bank *v.* Minthorne and Cookes *v.* Maxwell, and have granted relief where the party seeking it had been guilty of mistakes sought to be remedied, as in the case of Cannon *v.* Reynolds, 5 Ellis and Black, 301; Hatch *v.* Central National Bank, 78 N. Y., 487.

But in the case at bar the defendants in error have made no mistake. They applied to the court for relief, it is true, but not from any mistake of theirs. They simply asked the court that their verdict, as originally taken, should be

adjusted according to its terms and conditions. The court in designating the referee vouched for his competency and honesty. When it came to the knowledge of the court that its officer had made mistakes and misled the plaintiffs below to enter judgment for an insufficient amount, it became the duty of the court, as it was clearly within its power and discretion, to vacate the judgment and order a readjustment of the verdict.

As to Laches.

How the discoveries were made that errors had been committed in the adjustments made by the collector years before. It must be borne in mind that all the papers, invoices, and entries which are the basis upon which these adjustments are made, are on file in the custom-house, and not accessible to the importer, except by special permission of the collector. Hence there was no opportunity to make the discovery unless, suspicion having been aroused, the plaintiff or his attorney made special application to the collector for permission to examine the plaintiff's papers—invoices, and entries. And this application the regulations of the custom-house required should state the object of the examination.

Hence, unless suspicion existed that errors had been made the chances of discovery were few.

Let us take the case No. 108, Branson's Executrix *v.* Loeschigk *et al.*, and see how the discovery was made of the errors, amounting to $5,674.74, against the plaintiffs in that case.

If the court will turn to the record in No. 117, Redfield's Executrix *v.* Loeschigk *et al.*, at folio 15, it will be seen that on December 12, 1876, John I. Davenport, as clerk of the court to whom that case had been referred for adjustment, made his report. He says he has been attended by counsel for the respective parties, and has *taken and ex-*

amined the testimony offered in support of the plaintiff's claim, &c., meaning he had had before him all the plaintiff's invoices and entries, on which the plaintiffs had paid duty to the defendants below, viz., H. J. Redfield.

Greene C. Bronson was collector for six months immediately preceding Heman J. Redfield. And as the plaintiffs below, Loeschigh, Wesendonck & Co., entered some of their goods in bond, which were imported during Mr. Bronson's term of office, the duties on portions of which were not withdrawn from bond and duties paid until Mr. Redfield came into office, it became necessary, in adjusting the verdict in their suit against Redfield, to get up and examine all the warehouse entries made in Bronson's term, to see whether any of the goods were withdrawn, and duties paid to Redfield, during *his* term of office.

When those warehouse entries, made in Bronson's term, were brought before the referee, in December, 1876, the discovery was made that *some* mistakes had been made. Upon application then made to the collector, all the entries specified in their bill of particulars in that case were finally produced, and Henry K. Murray, the refund clerk in the naval office, made an examination of that particular case, and his affidavit, dated January 20, 1877, to the fact that *thirty* importations out of seventy-four *specified in the plaintiffs' bill of particulars had been omitted* in the original adjustment, will be found at folio 10 of the record in that case, 108.

Neither the plaintiff's testator nor the government have suffered any prejudice or inconvenience from delay in making the discovery or in making the motion to open the judgments. *The government owes this money.* The court directed a verdict for its payment and designated the referee to adjust that verdict, which in itself prescribed the rule for its adjustment, making the duties of the referee simply arithmetical. The errors were errors in computa-

tion—errors of facts over which the court unquestionably has control.

These cases have been upon the docket of this court nearly three years. The records show no exceptions in the court below, and no assignment of errors. And the first knowledge or intimation the undersigned had that the question presented by the first error assigned in the brief of the learned Solicitor-General, filed on the 15th instant, was to be raised in this court, was on Friday last.

The limited time which has since intervened will account for the imperfections of this brief, so hastily prepared.

A. W. Griswold,
Attorney for Def'ts in Error.

Supreme Court,

OF THE UNITED STATES.

LUCRETIA BRONSON, Executrix, &c., *vs.* JOHN W. SCHULTEN et al.	No. 107.

Brief of Defendant in Error.

The Record shows no exceptions in the Court below, and no assignment of errors.

The Record discloses no error which this Court will consider.

The judgment did not exceed the damages in plaintiff's declaration claimed to be due as of November 1st, 1853, viz., ... $3,000 00

(Folio 20). if we add interest on that sum to M'ch 1st, 1877, to date of Referee's Report, ... 4,899 04

$7,899 04

The Referee's Report finds the amount of principal to be	$1,205 90	
and interest to date of report, viz., March 1st, 1877, . . .	$2,017 21	$3,223 11
Excess of damages including interest ABOVE amount of Referee's Report, ...		$4,675 83

The defendant's Argument in No. 121 as to the 2d Assignment of Error is relied on in this case.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

LUCRETIA BRONSON *vs.* WILLIAM LOESCHIGK et al.	No. 108.

Same as No. 117.

The argument in No. 121 as to plaintiffs' 2d Assignment of Error is relied on in this case.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

AUGUSTUS SCHELL *agst.* E. WARBURG et al.	No. 112.

Not subject to Plaintiffs' 2d Assignment of Error.

AUGUSTUS SCHELL *agst* L. GROSSMAN.	No. 113.

Not subject to Plaintiffs' 2d Assignment of Error.

REDFIELD'S EXECUTORS *vs.* A. LACHAISE et al.	No. 116.

Not subject to Plaintiffs' 2d Assignment of Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

CONSTANCE C. REDFIELD, Executrix, &c., *vs.* WILLIAM LOESCHIGK and others.	No. 117.

Brief for the Defendants in Error.

Assumpsit (for excess of duties paid on charges and commissions).

Suit commenced in the Supreme Court of the City and County of New York, November 9th, 1863. On February 20th, 1864, cause removed by writ of certiorari to the U. S. Circuit Court (folios 4 and 5).

Defendants in error thereafter filed in the United States Circuit Court their *narr.*, containing the common money counts, claiming that the defendant (below) was on November 6th, 1863, indebted to the plaintiffs below in the sum of $1,600. (An evident mistake for $16,000.) Folios 5 to 7.

A bill of particulars was also filed. Folio 13.

Plea, general issue. Folio 8.

On April 21st, 1864, "by *consent of counsel*, the "jury found a verdict for plaintiffs (below) for ex-"cess of duties, with interest, * * * paid, un-"der protest * * * on *commissions over* 1½ "*per cent.*, on merchandise imported * * * "from Great Britain, and on *commissions over* 2 "*per cent.* on merchandise imported * * * "from the Continent of Europe (except Paris), "* * on *charges* * * * for the transporta-

"tion of the goods from the interior of the coun-
"try by railroad or water carriage, incurred prior
"to the time of exportation. * * * *the amount*
"of excess of duties exacted from the plain-
"tiffs (below), and paid to the defendant (be-
"low), *and embraced in the plaintiffs' bill of par-*
"*ticulars*, to be adjusted by the clerk of the Court
"or his deputy."

It is expressly *stipulated* in this verdict that if any of the several specified questions should arise on the adjustment, &c., the verdict should be opened and an opportunity to appeal given to the district attorney.

Folio 13.

The verdict also stipulated that a certificate of probable cause should be entered in the case.

Folio 13.

The clerk of the Court, to whom the cause was referred for adjustment, reported on December 12th, 1876, that he had been attended by counsel for the respective parties; had taken and examined the testimony offered in support of the *plaintiff's claim* and found that there was due them,

$9,170 10	principal and
13,753 85	interest.
$22,923 95	Folios 14 and 15.

December 16, 1876, judgment was signed

for	$22,923 95
Costs	548 94
	$23,472 89

Folios 9 and 10.

January 13, 1877, plaintiffs' attorney consents that a certificate of probable cause be entered. Folio 16.

January 13, 1877, plaintiffs waive payment of the judgment in coin. Folio 16.

January 13, 1877, the judgment was paid (in currency) and satisfied of record. Folio 17.

The defendant's argument in No. 121 as to Plaintiffs' 2d Assignment of Error is relied on in this case.

SUPREME COURT

OF THE UNITED STATES.

CONSTANCE C. REDFIELD, Executrix, &c., *vs.* MONCRIEF MITCHELL et al.	No. 118.

The Record shows no exceptions in the Court below, and no assignment of errors.

The Record discloses no error which this Court will consider.

The judgment did not exceed the damages in plaintiff's declaration, claimed to be due as of Sept 29th, 1860, viz:....	$5,000 00
(fol. 19) if we add interest on that sum from the date, when suit was commenced, to March 7, '77, date of Referee's Report....	5,773 56
Amounting to.....	$10,773 56

The Referee's Report finds the amount of principal to be.....	$3,030 50
and interest on this to date of report, viz: March 7, 1877.....	4,589 14
	$7,619 64
or if we compute interest on $3,030.50 (amount of principal), from Sept. 29th, 1860, the date of commencement of suit to date of report, we will find it to be..	$3,487 14
Deduct this from.....	4,589 14
the amount of interest, and we have as the interest on the $3,030.50, up to Sept.29th, 1860.....	$1,102 00
If we add this to the principal,.....	3,030 50
it shows the actual amount of plaintiff's claim, according to the Referee's Report, due on Sept. 29th, 1860, to be....	$4,132 50
which is less than the damages claimed.	

The defendant's argument in No. 121 as to Plaintiffs' 2d Assignment of Error is relied on in this case.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

CONSTANCE C. REDFIELD, Executrix, &c., et al. *vs.* BERNARD ANDREAE et al.	No. 120.

The record shows no exceptions in the Court below, and no assignment of error.

The record discloses no error which this Court will consider.

The judgment did not exceed the damages in plaintiffs' declaration claimed to be due as of July 1st, 1857, viz:..... $2,00 000

(Fol. 5), if we add interest on that sum from that date to October 23d, 1876, date of report..... $2,703 72

Amounting to..... $4,703 72

The Referee's report finds the amount of principal to be..	$1,759 05	
And interest to date of report, viz: October 23d, 1876.....	2,679 12	4,458 17

Excess of damages claimed *above* amount of Referee's report..... $245 55

The facts in this case are like No. 121, and the defendant's argument in that is relied on in this case.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

CONSTANCE C. REDFIELD, Executrix, &c. *vs.* A. B. THERIOTT.	No. 121.

Brief for the Defendant in Error.

Assumpsit (for excess of duties paid on charges and commissions.)

October 1st, 1860, suit commenced in Superior Court of the City of New York. (Folio 4.) October 18th, 1860, cause removed by writ of certiorari to U. S. Circuit Court.

Folio 5.

Thereafter the plaintiff (below) filed in the U. S. Circuit Court, his "narr," containing the common money counts, claiming that on October 1st, 1860, defendants below were indebted to plaintiff in the sum of $2,000, &c.

Folio 6.

And also filed a Bill of Particulars.

Folios 13–14.

Plea, general issue.

Fol. 8.

On November 13th, 1874, the attorneys for plaintiff and defendant below stipulated to refer the case to a Referee. (Folio 12.) "And it appearing * * * that the assessment of damages * * * will require the examination of long accounts and of numerous invoices and entries * * * specified in the bill of particulars," (folio 10), on December 4th, 1874, an order was made by the Court, pursuant to stipulation referring the case to John I. Davenport, Esq., as Referee, to make proof and ascertain the claim of the plaintiff (below,) "*with interest, &c., upon importations specified in the bill of particulars, &c.*"

Folios 10–11.

"Either party may, on the hearing before said "Referee, raise objections and exceptions, and the "Referee shall decide thereon, &c., &c. That said "Referee shall report on such cases with all con-"venient despatch, and on the coming in of such "report and the decision of such exceptions as may "be taken thereto by either party, *either party* "*shall be at liberty to move for judgment or ver-*"*dict for the amount, as to the Court shall seem* "*meet.*"

Fol. 11.

October 21st, 1876, Referee reports that *he has been attended by counsel for the respective parties*, has taken and examined the testimony offered in support of the plaintiff's claim, and finds that, upon the *importations specified in the plaintiff's bill of particulars*, there is due the plaintiffs (be-

low), in gold and silver coin $1,428.25 principal and $2,142.92 interest, making $3,571.17, total amount of report.

Folios 13, 14 and 15.

October 23d, 1876, attorneys for respective parties waive trial by jury, and stipulate to submit case to the Court without Jury.

Folio 16.

October 23d, 1876, the Court finds there is due the plaintiffs (below) $3,571.17, in gold and silver coin.

Folio 17.

October 24th, 1876, judgment docketed for $3,571.-17, in gold and silver coin, damages, and $112.22, costs, total amount $3,683.39.

Folio 9.

November 29th, 1876, Counsel on both sides consent to entry of certificate of probable cause.

Folio 18.

December 2d, 1876, judgment paid and satisfied of record, plaintiffs below waiving payment in coin.

Folio 19.

The record shows no exception in the Court below, and no assignment of errors.

The record discloses no error which this Court will consider.

The judgment did not exceed the damages in plaintiffs' declaration, claimed to be due as of October 1st, 1860, viz: $2,000 00 (folios 5-6); if we add interest on that sum from date, when suit was commenced to date of Referee's Report, Oct. 21, 1876, which would amount to		$2,247 67
Or together amounting to		$4,247 67
The Referee's Report finds the amount of principal upon importations specified in plaintiff's bill of particulars to be.....	$1,428 25	
And interest on this to date of Report, viz: Oct. 23d, 1876. Folios 13 to 15.....	$2,142 92	
If we compute interest on $1,428,25 (the amount of principal) from Oct. 1st, 1860, the date of commencement of suit, to date of report, we will find it to be.....	$1,605 38	$3,571 17
Deduct this from.....	$2,142 92	
the total amount of interest, and we have as the interest on the $1,428.25, up to Oct. 1st, 1860..... ...	$537 54	
If we add this to the principal	$1,418 25	
it shows the actual amount of plaintiffs' claim, according to the Referee's Report, due on October 1st, 1860, to be.....	$1,965 79	
which is less than the damages claimed.		

The error insisted on *here*, in the Solicitor General's brief, is simply an allegation of variance; that upon the evidence the Referee *reported*, and the Court *found due* to the plaintiffs, and *judgment was signed* for an amount greater than that claimed in the declaration.

No such objection was made in the Court below; it does not appear that any evidence offered by the plaintiffs (below), in support of the numerous items specified in the Bill of Particulars was objected to by the defendant below; nor does it appear that any exception was taken when the Referee reported the amount on which the Court announced its findings, or subsequently, when judgment was entered for the amount found due.

1st.

It was in the power of the Court below, and in conformity to its practice, to permit the declaration to be amended, by increasing the damages, to conform to the proofs made on the *Bill of Particulars*. And in view of the fact, that by the order of reference agreed upon between the parties and signed by the Court, December 4, 1874, it is stipulated that the Referee shall "*make proof of and ascertain the plaintiffs' claim* * * * for excess of duty upon such charges and commissions * * * *upon importations* * * * *specified in the Bill of Particulars*" * * * (folio 10, 11.) And the Report of the Referee finds that "*upon the importations specified in the plaintiffs' Bill of Particulars*" there is due the amount reported (folio 14); the Court would have allowed such amendment, had the objection been there taken.

Railroad Co. *v.* Lindsay, 4 Wall., 650.
Gregg, et al., *v.* Gier, 4 McLean, 208.
Knapp, et al., *v.* Roche, 62 N. Y., 614.
Davis *v.* Smith, 14 How. Pr., 187.

Merchant *v.* N. Y. Life Ins. Co., 2 Code Rep., 66.
Congdon, Ex'r, *v.* Maxwell, see appendix.

2d.

A party cannot take advantage of an objection which might have been obviated had it been raise l at the trial. The objection which the defendant now makes to the judgment, arising from a variance between the proofs and the pleadings, might have been so obviated, and is now too late.

Railroad Co. *v.* Lindsay, 4 Wall., 650.
Smith *v.* Floyd, 18 Barb., 522, 525-7.
Lawrence *v.* Barker, 5 Wend., 301-305.
Doane *v.* Eddy, 16 Wend., 523, 525-6.
Ford *v.* Monroe, 20 Wend., 210-11.

3d.

The entry of judgment, in conformity with the findings of the Court, based upon the report of the referee, computed upon importations specified in plaintiffs' bill of particulars, though far in amount in excess of that claimed in the declaration, was an *irregularity* only, and has been *waived* by the defendant.

The irregularity might have been corrected on the trial.

Knapp et al. *v.* Roche, 62 N. Y., 614.
Gregg et al. *v.* Gier, 4 McLean, 208.

The omission to object then was a *waiver*. Consent, verbal or written, or subsequent acquiescence, may waive an irregularity.

Farmers' Loan & Trust Co. *v.* Reid, 3 Edw. Ch., 414.
Ex parte Crosby, 8 Cowen, 119.
Maltby *v.* Murrells, 5 Hurlst. & N., 813.

Knowledge of a proceeding in which an irregularity exists will be construed as knowledge of the irregularity itself.

Esdaile *v.* Davis, 6 Dowl. P. C., 465.

4th.

The objection should have been taken within one year after the entry of the judgment by a motion to set aside the judgment.

See N. Y. Revised Statutes, Part III, Chap. VI, Title IV, Art. 1, Sec. 3. "No judg-"ment in any Court of Record shall be "set aside for irregularity on motion, "unless such motion be made within one "year after the time such judgment was "rendered."

Dederick *v.* Richley, 19 Wend., 108.
Cook *v.* Dickerson, 1 Duer., 679.
Van Benthuysen *v.* Lyle, 8 How., N. Y., 312.

The plaintiff below, by consenting to the entry of a certificate of probable cause (folio 18), relieved the defendant below from personal liability for the judgment debt, and relinquished his right to enforce the same against the property of said defendant.

United States Revised Statutes, § 989.

In addition to all this, the defendant below, to obtain his money, accepted payment at a discount by waiving payment of the judgment in gold and silver coin when at a premium. The judgment was thereupon paid and satisfied of record (fol. 19).

5th.

The consent to the reference, the stipulation that "either party shall be at liberty to move for judg-"ment or verdict for the amount as to the Court "shall seem meet," and the entry and *voluntary payment* of the judgment, waived any rights of the defendant below to object to the verdict or judgment as irregular, or unwarranted by law.

Yates *v.* Russel, 17 Johns., 461.
Farrington *v.* Hamblin, 12 Wend., 212.
Greene *v.* Patchin, 13 Wend., 293.
Hughes *v.* Bywater, 4 Hill, 551.

6th.

The judgment should not now be disturbed when reference and judgment were in pursuance of the consent in writing of the attorney for defendants below, *a fortiori*, when it was subsequently *voluntarily paid.*

Miller *v.* Tyler, 58 N. Y.

The Writs of Error should be dismissed, with costs.

A. W. GRISWOLD,
Atty. for Defts. in Error.

14-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1002~~. ~~652~~ ~~354~~ 108

LUCRETIA BRONSON, AS EXECUTRIX OF G. C. BRONSON, DECEASED, LATE COLLECTOR, &C., PLAINTIFF IN ERROR,

vs.

WILLIAM LOESCHIGK, OTTO WESENDOUCK, AND ANTHONY SCHEFER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 1002.

LUCRETIA BRONSON, AS EXECUTRIX OF G. C. BRONSON, DECEASED, LATE COLLECTOR, &C., PLAINTIFF IN ERROR,

vs.

WILLIAM LOESCHIGK, OTTO WESENDOUCK, AND ANTHONY SCHEFER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between William Loeschigk, Otto Wesendouck, & Anthony Schefer, plaintiffs, and Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, defendant, a manifest error hath happened to the great damage of the said Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, as by her complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 26 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Lucretia Bronson, as executrix of the last will and testament of G. C. Bronson, deceased, plaintiff in error, and William Loeschigk, Otto Wessendouck, and Anthony Schefer, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) U. S. Supreme Court. Lucretia Bronson, as executrix of the last will and testament of G. C. Bronson, deceased, plaintiff in error, against William Loeschigk, Otto Wesendouck, & Anthony Schefer, defendant' in error. Writ of error. Stewart L. Woodford, att'y for pl'ff in error.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def't in Error.

U. S. circuit court. Filed Jul. 26, 1878. John I. Davenport, clerk.
JULY 26, 1878.

3 U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* Heman J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner et al. *vs.* Same.
J. S. Gourd et al. *vs.* Same.
S. Guillaume et al. *vs.* Same.
E. B. Strange et al. *vs.* Same.
E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
C. Payen et al. *vs.* Same.
John Syz et al. *vs.* Same.
H. Lewis et al. *vs.* Same.
F. Schuchardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same. 354.
J. W. Schulten et al. *vs.* Greene C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Spies et al. *vs.* Same.
L. Grossmann *vs.* A. Schell.
E. Warburg et al. *vs.* Same.
C. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* A. Schell.

SIR: Please take notice that upon the annexed affidavits and copies of verdicts a motion will be made before a judge of this court on
4 the 30th day of December, 1876, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the judgments in the above-entitled causes be opened and the case referred to a referee, to ascertain and adjust the amounts due the plaintiffs under the verdicts in each of said cases respectively, and to report the facts so found by the referee to this court to be passed upon, and for such other and further relief as may be proper.

Dated Dec. 27th, 1876.

Yours, &c.,

ALMON W. GRISWOLD,
Pl'ffs' Att'y.

To GEORGE BLISS,
Df'ts' Att'y.

U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* H. J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner et al. *vs.* Same.

J. S. Gourd et al. *vs.* Same.
S. Guillaume et al. *vs.* Same.
E. B. Strange et al. *vs.* Same.
E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
Ch's Payen et al. *vs.* H. J. Redfield.
Jno. Syz et al. *vs.* Same.
Henry Lewis et al. *vs.* Same.
5 F. Schuchardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same.
J. W. Schulten et al. *vs.* G. C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Spies et al. *vs.* Same.
L. Grossmann et al. *vs.* Aug. Schell.
E. Warburg et al. *vs.* Same.
Ch's Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* Augustus Schell.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Almon W. Griswold, being duly sworn, says that the above entitled actions were brought to recover excess of duties paid on charges and commissions; that they came on for trial, and verdicts were rendered for the plaintiffs, and judgments entered thereupon in the years 1860 to 1866; and that copies of the verdicts rendered in said cases are hereto annexed.

That the adjustments in all the cases but three appear to have been made by the collector of customs or Samuel G. Ogden, jr., auditor at the custom-house in this city, and the other three cases by the clerk of the court to whom the cases were referred for that purpose.

That these adjustments were made by said collector of customs and by said auditor and clerk of this court, and the reports based thereon were duly filed and judgments entered thereon, and subsequently paid and satisfied of record as follows, to wit:

In the cases of

C. Gignoux et al. vs. H. J. Redfield, on March 3d, 1860.
6 J. W. Schulten et al. vs. H. J. Redfield, April 5th, 1860.
Wm. Brunner et al. vs. Same, December 30, 1861.
J. S. Gourd et al. vs. Same, June 22nd, 1860.
S. Guillaume et al. vs. Same, May 15th, 1861.
E. B. Strange et al. vs. Same, February 13th, 1864.
E. Warburg et al. vs. Same, October 6th, 1860.
O. Zollikoffer et al. vs. Same, January 9th, 1860.
C. F. Dambmann et al. vs. Same, November 17th, 1863.
T. Passavant et al. vs. Same, April 30th, 1861.
C. Payen et al. vs. Same, November 24th, 1860.
John Syz et al. vs. Same, March 20th, 1861.

Henry Lewis et al. vs. Same, April 15th, 1863.
F. Schuchardt et al. vs. Same, June 9th, 1860.
M. Mitchell et al. vs. Same, Feb'y 18th, 1864.
A. Lachaise et al. vs. Same, June 10th, 1864.
J. W. Schulten et al. vs. G. C. Bronson, March 21st, 1860.
Wm. Loeschigk et al. vs. Same, April 9th, 1861.
F. A. Spies et al. vs. Same, June 7th, 1861.
L. Grossmann vs. Aug. Schell, February 7th, 1866.
E. Warburg et al. vs. Same, August 18th, 1865.
Ch's Payen et al. vs. H. Barney, March 22nd, 1865.
Ferdinand Schuchardt et al. v. Aug. Schell, Jan'y 10th, 1865.

That early in 1864 deponent discovered that in the first fourteen of the above-entitled actions errors had been committed and items omitted in the adjustments by which the plaintiffs in each had recovered less than the amount due them under the verdicts, and for the purpose of recovering the amounts thus erroneously omitted in such adjust-
7 ments and judgments new actions were commenced against the defendant Redfield on the 19th day of May, 1864.

To these actions the defendant interposes the plea of the statute of limitation, which defense, deponent is apprehensive, will prevail and thereby defeat the plaintiffs' claims.

That as to the remaining cases this deponent had no knowledge or suspicion that the adjustments were not made in accordance with the verdicts, or that items embraced in the bills of particulars had been omitted, untill the recent adjustment of the cases of Ch's Payen et al. vs. Aug. Schell, Louis Grossmann et al. vs. Heman J. Redfield, and William Loeschigk et al. vs. Heman J. Redfield, and certain other cases, when it was discovered that mistakes had been made in the adjustment of the case of Ch's Payen vs. Barney and L. Grossmann vs. Schell, William Loeschigk et al. vs. G. C. Bronson, and other cases, the verdicts in which were similar to those in the cases herein above named. Upon readjusting the verdicts in these cases first above mentioned, it became necessary to examine the entries of the plff's made to other collectors, and that disclosed the fact that omissions and mistakes had been made in the adjustments of these cases also, by omitting items embraced in bills of particulars, and also because of their not having been adjusted according to the verdict, one having been adjusted upon the basis of Phillips' report only, without the modification of Treasury instructions of May 21st, 1863, as provided in said verdicts, while as to the first twenty-two of said cases, the adjustments were not made according to Phillips' report, as provided in the verdicts given in said cases, and items were omitted.

8 Deponent further says that by reason of these mistakes in the adjustments there is still due the plaintiffs in the above-entitled causes a portion of the money due them under said verdicts, for excess of duty paid on charges and commissions, and that such amounts cannot be ascertained without an examination of all the invoices and entries, and for that purpose the judgments should be opened, and the cases sent to a referee to have the amounts of the plaintiffs' damages in said causes readjusted according to the verdicts so rendered therein.

Deponent says that all the facts in said cases are precisely similar to those in the cases of J. W. Schulten et al. vs. Aug. Schell, Louis Grossman vs. H. J. Redfield, C. Payen et al. vs. Aug. Schell, and in which the judgments were opened by order of this court in the first case on

June 20th, 1871, and in the other cases on Aug. 13th, 1873, and the cases referred to a referee and readjusted according to the verdict therein.

ALMON W. GRISWOLD.

Sworn before me this 27th day of December, 1876.

CHA'S LEE CLARK,
Notary Public N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustus Heydenreich, being duly sworn, says the adjustments in 20 of the above-entitled cases were made at the custom-houses under the direction of the collector of the customs, or the auditor of the customs, and in three cases by the clerk of this court or his deputy.

9 Upon investigation deponent finds that the adjustments in the above-entitled cases were not made according to the verdicts, and also that items were omitted in said adjustments which were embraced in the bills of particulars, and should have been included therein; and by reason of these errors and omissions the plaintiffs in said several actions have not received the full amount of their respective claims.

Deponent says these errors in the adjustments may be accounted for from the fact that at the time these verdicts were in course of adjustment, a very large number of other verdicts, some of which differed from the verdicts in these cases, were also in course of adjustment, and the clerks employed on the work may have mistaken the form of verdict.

A. HEYDENREICH.

Sworn before me this 27 day of December, 1876.

CHA'S LEE CLARKE,
Notary Public N. Y. Co.

U. S. circuit court.

C. GIGNOUX ET AL.
vs. } 22 other causes.
HEMAN J. REDFIELD.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry K. Murray, being duly sworn, says he is refund clerk in the naval office, New York custom-house, and has been for near five years; that he has this day examined the entries, invoices, and papers

10 in the case of William Loeschigk et al. vs. Greene C. Bronson, which was adjusted under the verdict on charges and commissions and paid in the year 1861.

That out of the entries by seventy-four vessels and steamers specified in the plaintiffs' bill of particulars served in the case, thirty entries which should have been included in such adjustment were omitted, and no part of the excess of duty paid by the plaintiffs on those entries was refunded in that case, or has been since.

Deponent further says that he was not refund clerk at the time said case was adjusted.

H. K. MURRAY.

Sworn before me this 20th day of January, 1877,

A. HEYDENREICH.
Notary Public, Richmond Co., N. Y.

11 United States circuit court, southern district of New York.

WM. LOESCHIGK ET AL.
vs.
GREENE C. BRONSON.

MONDAY, *April 23rd*, 1860.

Present, Judge Hall.

Verdict for the plaintiffs for amount, with interest, of the difference between duties levied and paid under protest on commissions at 2½ per cent. and such duties if levied on commissions at 2 per cent. on all importations specified in the bill of particulars from Sweden, Denmark, Norway, and the continent of Europe, except Paris; and a like verdict for the plaintiffs for excess of duties levied and paid under protest upon importations specified in the bill of particulars upon charges above those set forth in Exhibit , being the report of Isaac Phillips, appraiser, and referred to in his testimony, except where the invoice shows that a higher rate of charges has been actually paid; and that it be referrred to the collector of customs at New York to determine the amount for which judgment shall be entered according to this verdict and report the same to this court.

12 U. S. circuit court, southern district of New York.

WM LOESCHIGK ET AL.
vs.
GREENE C. BRONSON.
And 22 other causes.

A motion having come on to be heard before this court in the above-entitled causes to open the judgments therein, now, on reading and filing notice of motion, dated December 27th, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenrich, on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiffs, and George Bliss, esq., U. S. district attorney, in opposition thereto, and due deliberation had, it is ordered that the judgments entered in the above-entitled causes upon the verdicts therein be vacated, and that the assessments of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, esquire, as sole referee.

And it is further ordered that the referee proceed to adjust de novo the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases respectively, and that he report the balance, if any, found due the plaintiffs in each of said causes.

The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, and either party
13 may on the hearing raise objections, and said referee shall decide thereon, and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report and bring them to a hearing before the court upon four days' notice.

Dated January 26, 1877.

(Signed) SAML. BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al. vs. Heman J. Redfield, & 22 other causes. Order of reference. A. W. Griswold, pl'ffs' att'y. Filed Jan'y 27, 1877.

14 U. S. circuit court, southern district of New York.

J. W SCHULTEN ET AL.
vs.
GREENE C. BRONSON. } O. S. 29.

WILLIAM LOESCHIGK ET AL.
vs.
GREENE C. BRONSON. } O. S. 294.

F. A. SPIES ET AL.
vs.
GREENE C. BRONSON. } O. S. 291.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Almon W. Griswold, being duly sworn, says he is the attorney for the plaintiffs in the three above-entitled actions; that since the commencement of said actions, the defendant Greene C. Bronson died, and that Lucretia Bronson was appointed executrix of said defendant's last will and testament.

ALMON W. GRISWOLD.

Sworn before me March 2nd, 1877.
[SEAL.]

A. HEYDENREICH,
Notary Public Richmond Co., N. Y.

15 The people of the State of New York to all to whom these presents shall come, or may concern, send greeting:

Know ye that we, having inspected the records of our surrogate's court in and for the county of New York, do find that on the 13th day of October, in the year one thousand eight hundred and sixty-three, by said court, letters testamentary on the estate of Greene C. Bronson, late of the city of New York, deceased, were granted and committed unto Lucretia Bronson, of said city, the sole executrix named in the last will and testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto affixed. Wi'ness, Delano C. Calvin, surrogate of our said county, at the city of New York, the second day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.]

PETER BURTSELL,
Clerk to the Surrogate's Court.

16 U. S. circuit court, southern district of New York.

J. W. SCHULTEN ET AL.
vs.
GREENE C. BRONSON. }

WILLIAM LOESCHIGK ET AL.
vs.
GREENE C. BRONSON. }

F. A. SPIES ET AL.
vs.
GREENE C. BRONSON. }

On reading and filing the annexed affidavit, and after hearing A. W.

Griswold in support of the motion, and H. E. Tremain, esq., assistant U. S. district attorney, in opposition thereto, now, on motion of Almon W. Griswold, plaintiffs' att'y, ordered that the three above-entitled actions be continued in the name of Lucretia Bronson, executrix of the last will and testament of Greene C. Bronson, deceased, as defendant, without prejudice to any proceedings heretofore had, or any waiver of any objections heretofore existing, provided the plaintiffs consent to the entry of a certificate of probable cause.

Dated March 8th, 1877.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court. J. W. Schulten et al. vs. Greene C. Bronson and 2 other causes. Affidavit, certificate, and order reviving actions. A. W. Griswold, pl'ff's att'y.

17 U. S. circuit court, southern district of New York.

J. W. SCHULTEN ET AL.
vs.
LUCRETIA BRONSON, EXECUTRIX, &c.

WILLIAM LOESCHIGK ET AL.
vs.
THE SAME.

F. A. SPIES ET AL.
vs.
THE SAME.

The plaintiffs in each of the above-entitled causes consent that a certificate of probable cause be entered in each of said causes.

Dated Mch. 8, 1877.

ALMON W. GRISWOLD,
Pl'ffs' Att'y.

(Endorsed:) U. S, circuit court, southern district of New York. J. W. Schulten et al. vs. Greene C. Bronson and 2 other causes. Affidavit. Order reviving actions & consent. A. W. Griswold, pl'ff's att'y. Filed Mch. 9, 1877.

18 Circuit court of the United States for the southern district of New York.

WILLIAM LOESCHIGK ET AL.
vs.
LUCRETIA BRONSON, EXECUTRIX.

In pursuance of an order made in the above entitled cause on the 26th day of January, in the year one thousand eight hundred and seventy-seven, by which it was referred to the undersigned to ascertain and report to this court whether, according to the verdict in said cause, anything, and if so, how much, is due the plaintiffs in this cause for duties on charges and commissions beyond the amount awarded therefor by the former report in said cause:

Now I, John I. Davenport, to whom the matter was referred, do report that I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the

plaintiffs' claim, and do find that under the verdict in said case there is now due the plaintiffs herein from the defendant as collector of the port of New York, as and for duties on charges and commissions beyond the amount awarded therefor by the said former report, the sum of twenty-one hundred and twenty-nine & $\frac{30}{100}$ dollars, in gold and silver coin, or in Treasury notes issued under the authority of the United States, principal, and to interest on said sum from the date of payment to the date of this my report, amounting to thirty-five hundred and forty-five & $\frac{44}{100}$ dollars, amounting in the aggregate to the sum of fifty-six hundred and seventy-four & $\frac{74}{100}$ dollars, and that a statement of the said excess so paid by the said plaintiffs to the said defendant as and for duties on charges and as and for duties on commissions beyond the said amount heretofore awarded therefor, together with the interest due thereon, forming part of this my report, is on file in the office of the collector of custom at the port of New York.

All of which is respectfully submitted.

Dated New York, March 7th, 1877.

JOHN I. DAVENPORT,
Referee.

2,129	30
3,545	44
$5,674	74

Referee fees, $82.00.

(Endorsed:) U. S. circuit court, southern district of New York. William Loeschigk et al. vs. Lucretia Bronson, executrix, &c. Referee's report. John I. Davenport, referee. Filed March 10, 1877.

19 U. S. circuit court.

WILLIAM LOESCHIGK ET AL.
vs.
LUCRETIA BRONSON, EXECUTRIX, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court and, by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 12th day of October, 1859, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the 8th day of December, in the year of our Lord one thousand eight hundred and fifty-nine, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case—

For that whereas the said defendant, on the 1st day of November, one thousand eight hundred and fifty-three, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of one thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended, for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of one thousand dollars, of lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly
20 to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of one thousand dollars; and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

21 And the said defendant, by the U. S. dis't att'y, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him; and of this he puts himself upon the country, &c.

Therefore the issue above joined is ordered by the said court to be tried at a circuit court, appointed to be held at the city hall of the city of New York, on the 1st Monday of April, in the year 1860.

And now at this day, to wit, the 23d day of April, 1860, being as yet of the said April term, before the said justices, at the city hall of the said city of New York, came the said parties by their attorney afore-

said, and the said circuit judge, before whom the said issues were tried, has sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within
22 contained, before Wm. D. Shipman, esq., judge of the said circuit court, came as well the within named plaintiffs as the said defendant, by their respective attorneys within mentioned, and the jurors of the jury, whereof mention is within made, being summoned, also came, who, to speak the truth in the matters within contained, being chosen, tried, and sworn upon their oaths, do say that the said defendant did undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs by reason of the premises at the sum of fifty-six hundred & seventy-four & $\frac{74}{100}$ dollars over and above their costs and charges by him about his suit in this behalf expended, and for those costs and charges the sum of one hundred and forty-seven
23 & $\frac{33}{100}$ dollars.

Therefore it is considered that the said plaintiffs recover against defendant their damages aforesaid, by the jurors aforesaid in form aforesaid found, and also their costs and charges of increase by the court now here adjudged to the said plaintiffs with their assent, which said damages, costs, and charges in the whole amount to fifty-eight hundred and twenty-two & $\frac{07}{100}$ dollars.

Judgment signed this 10th day of March, 1877.

J. M. DEUEL,
Dep'y Clerk.

5,674	74
147	33
$5,822	07

(Endorsed:) U. S. circuit court. William Loeschigk et al. vs.
24 Lucretia Bronson, executrix, &c. Judgment roll. A. W. Griswold, pl'ffs' att'y. Filed March 10, 1877.

25 UNITED STATES OF AMERICA, *ss:*

To William Loeschigk, Otto Wesendouck, & Anthony Schefer, and their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Lucretia Bronson, as executrix of the last will & testament of G. C. Bronson, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated July 25, 1878.

SAM'L BLATCHFORD.

26 (Endorsed:) U. S. Supreme Court. Lucretia Bronson, as executrix of the last will and testament of G. C. Bronson, deceased, plaintiff in error, against William Loeschigk, Otto Wesendouck, & An-

thony Schefer, defendant' in error. Citation. Stewart L. Woodford, att'y, for pl'ff in error.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def't in Error.

U. S. circuit court. Filed Jul. 26, 1878. John I. Davenport, clerk.
JULY 26, 1878.

(Indorsement on cover:) No. 1002. Lucretia Bronson, as ex't'x of G. C. Bronson, dec'd, late collector, &c., plaintiff in error, vs. William Loeschigk, Otto Wesendouck, & Anthony Schefer. S. New York C. C. U. S. Filed December 2, 1878.

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111

14-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1007.~~ 657 ~~350~~ 113

AUGUSTUS SCHELL, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

LOUIS GROSSMAN, SURVIVING PARTNER OF GROSSMAN BROS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

A

SUPREME COURT OF THE UNITED STATES.

No. 1007.

AUGUSTUS SCHELL, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

LOUIS GROSSMAN, SURVIVING PARTNER OF GROSSMAN BROS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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3 U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* Heman J. Redfield.
J. W. Schulten et al. *vs.* Same.
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C. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* A. Schell.

SIR: Please take notice that upon the annexed affidavits and copies of verdicts a motion will be made before a judge of this court on
4 the 30th day of December, 1876, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the judgments in the above-entitled causes be opened and the case referred to a referee, to ascertain and adjust the amounts due the plaintiffs under the verdicts in each of said cases respectively, and to report the facts so found by the referee to this court to be passed upon, and for such other and further relief as may be proper.

Dated Dec. 27th, 1876.

Yours, &c.,

ALMON W. GRISWOLD,
Pl'ff's Att'y.

To GEORGE BLISS, Esq.,
Def't's Att'y.

U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* H. J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner at al. *vs.* Same.
J. S. Gourd at al. *vs.* Same.
L. Guillaume et al. *vs.* Same.
E. B. Strange et al. *vs.* Same.

E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
Chs. Payen et al. *vs.* H. J. Redfield.
Jno. Syz et al. *vs.* Same.
5 Henry Lewis et al. *vs.* Same.
F. Schuchardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same.
J. W. Schulten et al. *vs.* G. C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Speis et al. *vs.* Same.
L. Grossman *vs.* Aug. Schell.
E. Warburg et al. *vs.* Same.
Chs. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* Augustus Schell.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Almon W. Griswold, being duly sworn, says that the above-entitled actions were brought to recover excess of duties paid on charges and commissions; that they came on for trial and verdicts were rendered for the plaintiffs, and judgments entered thereupon in the years 1860 to 1866; and that copies of the verdicts rendered in said cases are hereto annexed. That the adjustments in all the cases but three appear to have been made by the collector of customs or Samuel G. Ogden, jr., auditor at the custom-house in this city, and the other three cases by the clerk of the court to whom the cases were referred for that purpose.

That these adjustments were made by said collector of customs and by said auditor and clerk of this court, and the reports based thereon were duly filed and judgments entered thereon, and subsequently paid and satisfied of record as follows, to wit:

In the cases of—
6 C. Gignoux et al. vs. H. J. Redfield, on March 30, 1860.
J. W. Shulten et al. vs. Same, April 5th, 1860.
Wm. Brunner et al. vs. Same, December 30th, 1861.
J. S. Gourd et al. vs. Same, June 22nd, 1860.
S. Guillaume et al. vs. Same, May 15th, 1861.
E. B. Strange et al. vs. Same, February 13th, 1864.
E. Warburg et al. vs. Same, October 6th, 1860.
O. Zollikoffer et al. vs. Same, January 9th, 1860.
C. F. Dambmann et al. vs. Same, November 17th, 1863.
T. Passavant et al. vs. Same, April 30th, 1861.
C. Payen et al. vs. Same, November 24th, 1860.
John Syz et al. vs. Same, March 20th, 1861.
Henry Lewis et al. vs. Same, April 15th, 1863.
F. Schuchardt et al. vs. Same, June 9th, 1860.
M. Mitchell et al. vs. Same, Feb'y 13th, 1864.
A. Lachaise, et al. vs. Same, June 10th, 1864.
J. W. Shulten et al. vs. G. C. Bronson, March 21st. 1860
Wm. Loeschigk et al. vs. Same, April 9th, 1861.
F. A. Spies, et al. vs. Same, June 7th, 1861.

L. Grossman vs. Aug. Schell, February 7th, 1866.
E. Warburg et al. vs. Same, August 18th, 1865.
Chs. Payen et al. vs. H. Barney, March 22nd, 1865.
Ferdinand Schuchardt et al. v. Aug. Schell, Jan'y 10th, 1865.

That early in 1864 deponent discovered that in the first fourteen of the above-entitled actions errors had been committed and items omitted in the adjustments by which the plaintiffs in each had recovered less than the amount due them under the verdicts, and for the pur-
7 pose of recovering the amounts thus erroneously omitted in such adjustments and judgments, new actions were commenced against the defendant, Redfield, on the 19th day of May, 1864.

To these actions the defendant interposes the plea of the statute of limitations, which defense deponent is apprehensive will prevail, and thereby defeat the plaintiffs' claims.

That as to the remaining cases, this deponent had no knowledge or suspicion that the adjustments were not made in accordance with the verdicts, or that items embraced in the bills of particulars had been omitted until the recent adjustment of the cases of Chas. Payen et al. vs. Aug. Schell, Lewis Grossmann et al. vs. Heman J. Redfield, and William Loeschigk et al. vs. Heman J. Redfield, and certain other cases, when it was discovered that mistakes had been made in the adjustment of the case of Chs. Payen vs. Barney, and L. Grossman vs. Schell, William Loeschigk et al. vs. Bronson, and other cases, the verdicts in which were similar to those in the cases hereinabove named. Upon readjusting the verdicts in these cases first above mentioned it became necessary to examine the entries of the plaintiffs made to other collectors, and that disclosed the fact that omissions and mistakes had been made in the adjustments of these cases also by omitting items embraced in bills of particulars, and also because of their not having been adjusted according to the verdict, one having been adjusted upon the basis of Phillips' report only, without the modification of treasury instructions of May 21st, 1863, as provided in said verdicts, while as to the first twenty-two of said cases the adjustments were not made according to Phillips' report, as provided in the verdicts given in said cases,
8 and items were omitted.

Deponent further says that by reason of these mistakes in the adjustments, there is still due the plaintiffs in the above entitled causes a portion of the money due them under said verdicts, for excess of duty paid on charges and commissions, and that such amounts cannot be ascertained without an examination of all the invoices and entries, and for that purpose the judgments should be opened and the cases sent to a referee to have the amounts of the plaintiffs' damages in said causes readjusted according to the verdicts rendered therein.

Deponent says that all the facts in said cases are precisely similar to those in the cases of J. W. Schulten et al. vs. Aug. Schell, Louis Grossmann vs. H. J. Redfield, C. Payen et al. vs. Aug. Schell, and in which the judgments were opened by order of this court in the first case on June 20th, 1871, and in the other cases on Aug. 13th, 1873, and the cases referred to a referee and readjusted according to the verdict therein.

ALMON W. GRISWOLD.

Sworn before me this 27th day of December, 1876.

CHAS. LEE CLARKE,
Notary Public N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustus Heydenreich, being duly sworn, says the adjustments in 20 of the above-entitled cases were made at the custom-house under the direction of the collector of the customs, and in three cases by the clerk of this court or his deputy.

9 Upon investigation deponent finds that the adjustments in the above-entitled cases were not made according to the verdicts, and also that items were omitted in said adjustments which were embraced in the bills of particulars & should have been included therein; and by reason of these errors and omissions the plaintiffs in said several actions have not received the full amount of their respective claims.

Deponent says these errors in the adjustments may be accounted for from the fact that at the time these verdicts were in course of adjustment, a very large number of other verdicts, some of which differed from the verdicts in these cases, were also in course of adjustment, and the clerks employed on the work may have mistaken the form of verdict.

A. HEYDENREICH.

Sworn before me this 27 day of December, 1876.

CHAS. LEE CLARKE,
Notary Public N. Y. Co.

U. S. circuit court.

C. GIGNOUX ET AL.
vs.
HEMAN J. REDFIELD. } & 22 other cases.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry K. Murray, being duly sworn, says he is refund clerk in the naval office, New York custom-house, and has been for near five years; that he has this day examined the entries, invoices, and papers in the case of William Loeschigk et al. vs. Greene C. Bronson, which was

10 adjusted under the verdict on charges and commissions and paid in the year 1861; that out of the entries by seventy-four vessels and steamers specified in the plaintiffs' bill of particulars served in the case, thirty entries which should have been included in such adjustment were omitted, and no part of the excess of duty paid by the plaintiffs on those entries was refunded in that case, or has been since.

Deponent further says that he was not refund clerk at that time said case was adjusted.

H. K. MURRAY.

Sworn before me this 20th day of January, 1877.

A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

U. S. circuit court, southern district of New York.

LOUIS GROSSMAN, SURVIVING PARTNER, &C.,
vs.
A. SCHELL. }

EDW'D WARBURG ET AL.
vs.
AUG. SCHELL.

By consent of counsel the jury find a verdict for the plaintiffs in each

of the above-entitled causes for the amount, with interest, of the excess of duties paid under protest on more than 2% commissions on all importations specified in the bill of particulars in each cause, from the continent of Europe, except Paris, and on more than 1½% commission on importations from Great Britain, and a like verdict for the excess of duty
11 paid under protest on the importations from the continent of Europe, specified in the bill of particulars in each cause upon charges above those set forth in the reports of Isaac Phillips, appraiser, dated Oct. 13th, 1856, and of the several subsequent dates, the amount in each case to be adjusted by the clerk of this court or his deputy.

Date of verdict Ap'l 10, 1863.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al. vs. Heman J Redfield, and 22 other causes. Notice, motion & affidavits. A. W. Griswold, pl'ffs' att'y, 120 Broadway. Filed Jan'y 27, 1877.

12 U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* Heman J. Redfield.
J. W. Schulten et al. *vs.* The Same.
William Brunner et al. *vs.* The Same.
J. S. Gourd et al. *vs.* The Same.
S. Guillaume et al. *vs.* The Same.
E. B. Strange et al. *vs.* The Same.
H. Lewis et al. *vs.* Heman J. Redfield.
E. Warburg et al. *vs.* Heman J. Redfield.
O. Zollikoffer et al. *vs.* The Same.
C. F. Dambmann et al. *vs.* The Same.
T. Passavant et al. *vs.* The Same.
C. Payen et al. *vs.* The Same.
John Syz et al. *vs.* The Same.
F. A. Spies et al. *vs.* Greene C. Bronson.
13 F. Schuchardt et al. *vs.* The Same.
M. Mitchell et al. *vs.* The Same.
A. Lachaise et al. *vs.* The Same.
J. W. Schulten et al. *vs.* Greene C. Bronson.
Wm. Loeschigk et al. *vs.* The Same.
L. Grossman *vs.* Augustus Schell.
E. Warburg et al. *vs.* The Same.
C. Payen et al. *vs.* Hiram Barney.
F. Schuchardt et al. *vs.* Augustus Schell.

A motion having come on to be heard before this court in the above-entitled causes to open the judgments therein:

Now, on reading and filing notice of motion, dated December 27th, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich on the part of the plaintiff, and Almon W. Griswold having
14 been heard for the motion on the part of the plaintiffs and George Bliss, esq., U. S. district attorney, in opposition thereto, and due deliberation had, it is ordered that the judgments entered in the above-entitled causes upon the verdicts therein be vacated, and that the assess-

ments of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, esq., as sole referee.

And it is further ordered that the referee proceed to adjust de novo the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases respectively, and that he report the balance, if any, found due the plaintiffs in each of said causes.

The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, and either party may on the hearing raise objections, and said referee shall decide thereon, and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring
15 them to a hearing before the court upon four days' notice. Dated January 26, 1877.

(Signed) SAM'L. BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al., vs. Heman J. Redfield & 22 other cases. Order of reference. A. W. Griswold, pl'ffs' att'y. Filed Jan'y 27, 1877.

16 Circuit court of the United States for the southern district of New York.

L. GROSSMANN, SURVIVING PARTNERS, &c.,
vs.
AUGUSTUS SCHELL.

In pursuance of an order made in the above-entitled cause on the 26 day of January, in the year one thousand eight hundred and seventy-seven, by which it was referred to the undersigned to ascertain and report to this court whether, according to the verdict in said cause, anything, and if so, how much, is due the plaintiffs in this cause for duties on charges and commissions beyond the amount awarded therefor by the former report in said cause:

Now I, John I Davenport, to whom the matter was referred, do report that I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiff's claim, and do find that under the verdict in said case there is now due the plaintiffs herein from the defendant, as collector of the port of New York, as and for duties on charges and commissions beyond the amount awarded therefor by the said former report, the sum of three hundred and forty-three & $\frac{32}{100}$ dollars in gold and silver coin, or in treasury notes issued under the authority of the United States, principal, and to interest on said sum from the date of payment to the date of this my report, amounting to four hundred and sixty-four & $\frac{86}{100}$ dollars, amounting in the aggregate to the sum of eight hundred and eight & $\frac{25}{100}$ dollars, and that a statement of the said excess so paid by the said plaintiffs to the said defendant as and for duties on charges and as and for duties on commissions beyond the said amount heretofore awarded therefor, together with the interest due thereon, forming part of this my report, is on file in the office of the collector of customs, at the port of New York.

All of which is respectfully submitted.
Dated, New York, January 20, 1877.

JOHN I. DAVENPORT,
Referee.

343.39
464.86
———
808.25
—33. F

Approved.

STEWART L. WOODFORD,
U. S. Attorney.

17 (Endorsed:) O. S. 1095. U. S. circuit court. L. Grossman, surviving partner, &c. Augustus Schell. Referee's report. A. W. Griswold, pl'ff's att'y. John I. Davenport, referee. Filed March 31, 1877.

18 U. S. circuit court.

L. GROSSMAN, SURVIVING PARTNER, &c.,
vs.
AUGUSTUS SCHELL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court and by A. W. Griswold, their attorney, suggest, and give the court now here to understand and be informed, that heretofore, to wit, on the 1st day of April, 1863, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided, in favor and in the name of said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and
19 the summons therein was filed in the clerk's office of the said superior court. That the defendant afterwards, by his attorney, duly appeared in said action and such proceedings were thereupon had that afterwards, and on the 10th day of April, in the year of our Lord one thousand eight hundred and sixty-three, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action
20 against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case:

For that whereas the said defendant, on the 1st day of April, one thousand eight hundred sixty-three, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of two thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request

of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use
21 of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to-wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said
22 plaintiffs in the further sum of two thousand dollars of lawful money as aforesaid. And being so found in arrear, and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested:

Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars; and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
23 *Attorney for Plaintiffs.*

(Endorsed:) U. S. circuit court. vs. Declaration. A. W. Griswold, pl'ffs' att'y.

Please take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after a service of a copy thereof, and notice of said rule or judgment on his attorney.

New York, 187 .

24 A. W. GRISWOLD,
Pl'ffs' Att'y.

Service of a copy of within and of the above notice is admitted.

And the said defendant, by the U. S. dist. attorney, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiff has above thereof declared against him; and of this he puts himself upon the country, &c. Therefore the issue above joined is ordered by the said court to be tried at a circuit court appointed to be held at the city hall of the city of New York, on the 1st Monday of April, in the year 1863. And now, at this day, to wit, the 10th day of April, 1863, being

as yet of the said April term, before the said justices at the city
25 hall of the said city of New York, came the said parties, by their attorneys aforesaid; and the said circuit judge, before whom the said issued was tried, has sent hither his record had before him, in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Wm. D. Shipman, esq., judge of the said circuit court, came as well the within-named plaintiff as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also came, who, to speak the truth in the matters within contained, being chosen, tried, and sworn upon their oaths, do say that the said defendant did undertake and promise in manner and form as the said plaintiff has above thereof complained against him; and they assess the damages
26 of the said plaintiff by reason of the premises at the sum of eight hundred and eight & $\frac{25}{100}$ dollars, over and above their costs and charges by him about his suit in this behalf expended, and for those costs and charges the sum of sixty-nine & $\frac{87}{100}$ dollars.

Therefore it is considered that the said plaintiff recover against said defendant his damages aforesaid, by the jurors aforesaid in form aforesaid found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiff with his assent, which said damages, costs, and charges in the whole amount to eight hundred and seventy-eight & $\frac{12}{100}$ dollars.

Judgment signed this 3 day of March, A. D. 1877.

J. M. DEUEL,
Dep'ty Clerk.

$808.25
69.87

$878.12

27 (Endorsed:) U. S. circuit court. L. Grossman, surviving partner, &c., vs. Augustus Schell. Judgment roll. A. W. Griswold, pl'ffs' att'y. Filed March 3, 1877.

28 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Saturday the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-seven:

Present: The honorable Samuel Blatchford, district judge.

L. GROSSMANN *vs.* AUGUSTUS SCHELL. } And three other cases.

On reading and filing notice of motion herein, with admission of service, and affidavit of Frederick W. Brooks, esq., and after hearing Stewart L. Woodford, esq., U. S. district attorney, in support of the motion, and A. W. Griswold, esq., of counsel for plaintiffs, in opposition thereto, it is ordered that certificates be entered in each of the four above-entitled actions; that the money for which the judgments were recovered herein was exacted by the defendants herein, or was paid to them, and was by them paid into the Treasury in the performance of their official duty as collectors of the port of New York; and that they acted under the directions of the Secretary of the Treasury.

And it is further ordered that said certificates be entered nunc pro tunc as of the days when said judgments were severally recorded.

And it is further ordered that the executions heretofore issued
29 against the property of the defendants herein be, and the same are hereby, stayed and set aside.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, south. dist. of New York. A. Friedmann, survivor, &c., vs. Hiram Barney, & 3 other causes. Order setting aside execution. &c. A. W. Griswold, pl'ffs' att'y S. L. Woodford, d'f'ts' att'y. U. S. circuit court. Filed Sept. 13, 1877. John I. Davenport, clerk.

30 UNITED STATES OF AMERICA, *ss:*

To Louis Grossmann, surviving partner of the firm of Grossmann Brothers, and his attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Augustus Schell is plaintiff in error; and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated July 25, 1878.

SAM'L BLATCHFORD.

31 (Indorsed:) U. S. Supreme Court. Augustus Schell, plaintiff in error, against Louis Grossman, surviving partner of the firm of Grossman Brothers, defendant in error. Citation. Stewart L. Woodford, att'y for pl'ff in error.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def't in Error.

July 26, 1878.

(Indorsement on cover:) No. 1007. Augustus Schell, late collector, &c., plaintiff in error, vs. Louis Grossman, surviving partner of Grossman Bros. S. New York C. C. U. S. Filed December 2, 1878.

14-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1010.~~ ~~669~~ ~~662~~ 116

CONSTANCE C. REDFIELD, AS EXECUTRIX, AND FRANK B REDFIELD, AS EXECUTOR, OF H. J. REDFIELD, DECEASED, LATE COLLECTOR, &c., PLAINTIFFS IN ERROR,

vs.

AMANDA LA CHAISE AND VICTOR FAUCHÉ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 1010.

CONSTANCE C. REDFIELD, AS EXECUTRIX, AND FRANK B. REDFIELD, AS EXECUTOR, OF H. J. REDFIELD, DECEASED, LATE COLLECTOR, &c., PLAINTIFFS IN ERROR,

vs.

AMANDA LA CHAISE AND VICTOR FAUCHÉ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Armand La Chaise & Victor Fauché, plaintiffs, and Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, defendants, a manifest error hath happened, to the great damage of the said Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14 day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT.

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to forty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Constance C. Redfield as executrix and Frank B. Redfield, as executor of the last will and testament of Heman J. Redfield, deceased, plaintiffs in error, against Armand La Chaise & Victor Fauché, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

(Indorsed:) O. S. 354. U. S. Supreme Court. Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, plaintiffs in error, against

Armand La Chaise & Victor Fauché, defendants in error. Writ of error. Stewart L. Woodford, att'y for pl'ffs in error.

I hereby admit due service of a copy of the within.

———— ————,

78. *Att'y for Def'st in Error.*

U. S. circuit court, Sep. 18, 1878.

JOHN I. DAVENPORT, *Clerk.*

3 *Affidavit of service of copy of writ of error.*

U. S. Supreme Court.

CONSTANCE C. REDFIELD, &c.,
against
ARMAND LA CHAISE & ANO.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Sidney Ormsby, being duly sworn, says he is a clerk in the office of Stewart L. Woodford, United States attorney; that on the 17th day of Sept., 1878, he served a copy of the hereto annexed upon A. W. Griswold, in this action, by delivering said copy to A. W. Griswold personally, and leaving the same with him. And deponent further says he is over seventeen years of age.

SIDNEY ORMSBY.

Sworn to before me this 17th day of September, 1878.
[SEAL.] SUTHERLAND TENNEY,
Notary Public, No. 52, N. Y. County.

4 U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* Heman J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner et al. *vs.* Same.
J. S. Gourd et al. *vs.* Same.
S. Guillaume et al. *vs.* Same.
E. B. Strange et al. *vs.* Same.
E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
C. Payen et al. *vs.* Same.
John Syz et al. *vs.* Same.
H. Lewis et al. *vs.* Same.
F. Schuchardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same.
J. W. Schulten et al. *vs.* Greene C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Speis et al. *vs.* Same.
L. Crossmann *vs.* A. Schell.

E. Warburg et al. *vs.* Same.
C. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* A. Schell.

SIR: Please take notice that upon the annexed affidavits and copies of verdicts a motion will be made before a judge of this court on
5 the 30th day of December, 1876, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the judgments in the above entitled causes be opened and the case referred to a referee, to ascertain and adjust the amounts due the plaintiffs under the verdicts in each of said cases, respectively, and to report the facts so found by the referee to this court to be passed upon, and for such other and further relief as may be proper.

Dated Dec. 27th, 1876.

Yours, &c.,

ALMON W. GRISWOLD,
Pl'ffs' Att'y.

To GEORGE BLISS, Esq.,
Df'ts' Att'y.

U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* H. J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner et al. *vs.* Same.
J. S. Gourd et al. *vs.* Same.
S. Guillaume et al. *vs.* Same.
E. B. Strange et al. *vs.* Same.
E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
Chs. Payen et al. *vs.* H. J. Redfield.
Jno. Syz et al. *vs.* Same.
6 Henry Lewis et al. *vs.* Same.
F. Schuchardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same.
J. W. Schulten et al. *vs.* G. C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Spies et al. *vs.* Same.
L. Crossman *vs.* Aug. Schell.
E. Warburg et al. *vs.* Same.
Chs. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* Augustus Schell.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Almon W. Griswold, being duly sworn, says that the above-entitled actions were brought to recover excess of duties paid on charges and commissions; that they *they* came on for trial and verdicts were rendered for the plaintiffs and judgments entered thereupon in the years

1860 to 1866; and that copies of the verdicts rendered in said cases are hereto annexed.

That the adjustments in all the cases but three appear to have been made by the collector of customs or Samuel G. Ogden, jr., auditor at the custom-house in this city, and the other three cases by the clerk of the court to whom the cases were referred for that purpose.

That these adjustments were made by said collector of customs and by said auditor and clerk of this court, and the reports based thereon were duly filed and judgments entered thereon, and subsequently paid and satisfied of record as follows, to wit:

7 In the cases of—

C. Gignoux et al. vs. H. J. Redfield, on March 3d, 1860.
J. W. Schulten et al. vs. same, April 5th, 1860.
Wm. Brunner et al. vs. same, December 30th, 1861.
J. S. Gourd et al. vs. same, June 22nd, 1860.
S. Guillaume et al. vs. same, May 15th, 1861.
E. B. Strange et al. vs. same, February 13th, 1864.
E. Warburg et al. vs. same, October 6th, 1860.
C. Zollikoffer et al. vs. same, January 9th, 1860.
C. F. Dambmann et al. vs. same, November 17th, 1863.
T. Passavant et al. vs. same, April 30th, 1861.
C. Payen et al. vs. same, November 24th, 1860.
John Syz et al. vs. same, March 20th, 1861.
Henry Lewis et al. vs. same, April 15th, 1863.
F. Schuchardt et al. vs. same, June 9th, 1860.
M. Mitchell et al. vs. same, Feb'y 13th, 1864.
A. Lachaise et al. vs. same, June 10th, 1864.
J. W. Schulten et al. vs. G. C. Bronson, March 21st, 1860.
Wm. Loeschigk et al. vs. same, April 9th, 1861.
F. A. Spies et al. vs. same, June 7th, 1861.
L. Crossmann vs. Aug. Schell, February 7th, 1866.
E. Warburg et al. vs. same, August 18th, 1865.
Ch's Payen et al. vs. H. Barney, March 22nd, 1865.
Ferdinand Schuchardt et al. v. Aug. Schell, Jan'y 10th, 1865.

That early in 1864 deponent discovered that in the first fourteen of the above-entitled actions errors had been committed and items omitted in the adjustments, by which the plaintiffs in each had recovered
8 less than the amount due them under *under* the verdicts, and for the purpose of recovering the amounts thus erroneously omitted in such adjustments and judgments new actions were commenced against the defendant Redfield on the 19th day of May, 1864.

To these actions the defendant interposes the plea of the statute of limitation, which defense, deponent is apprehensive, will prevail and thereby defeat the plaintiffs' claims.

That as to the remaining cases this deponent had no knowledge or suspicion that the adjustments were not made in accordance with the verdicts, or that items embraced in the bills of particulars had been omitted until the recent adjustment of the cases of Chas. Payen et al. vs. Aug. Schell, Lewis Crossman et al. vs. Heman J. Redfield, and William Loeschigk et al. vs. Heman J. Redfield, and certain other cases, when it was discovered that mistakes had been made in the adjustment of the case of Ch's Payen vs. Barney, and L. Crossman vs. Schell, William Loeschigk et al. v. C. C. Bronson, and other cases, the verdicts in which were similar to those in the cases herein above named; upon re-adjusting the verdicts in these cases, first above mentioned, it became necessary to examine the entries of the pl'ffs made to other collectors,

and that disclosed the fact that omissions and mistakes had been made in the adjustments of these cases also, by omitting items embraced in bills of particulars, and also because of their not having been adjusted according to the verdict, one having been adjusted upon the basis of Phillips' report only without the modification of treasury instructions of May 21st, 1863, as provided in said verdicts, while as to the first twenty-two of said cases the adjustments were not made accord-
9 ing to Phillips' report, as provided in the verdicts given in said cases, and items were omitted.

Deponent further says that by reason of these mistakes in the adjustments, there is still due the plaintiffs in the above entitled causes a portion of the money due them under said verdicts, for excess of duty paid on charges and commissions, and that such amounts cannot be ascertained without an examination of all the invoices and entries, and for that purpose the judgments should be opened, and the cases sent to a referee to have the amounts of the plaintiffs' damages in said causes readjusted according to the verdicts so rendered therein.

Deponent says that all the facts in said cases are precisely similar to those in the cases of J. W. Schulten et al. vs. Aug. Schell, Louis Crossmann vs. H. J. Redfield, C. Payen et al. vs. Aug. Schell, and in which the judgments were opened by order of this court in the first case on June 20th, 1871, and in the other cases on Aug. 13th, 1873, and the cases referred to a referee and readjusted according to the verdict therein.

ALMON W. GRISWOLD.

Sworn before me this 27th day of December, 1876.

CHAS. LEE CLARKE,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustus Haydenreich, being duly sworn, says the adjustments in
20 of the above entitled cases were made at the custom-house under the direction of the collector of the customs, or the auditor of the
10 customs, and in three cases by the clerk of this court or his deputy.

Upon investigation deponent finds that the adjustments in the above-entitled cases were not made according to the verdicts, and also that items were omitted in said adjustments which were embraced in the bills of particulars & should have been included therein; and by reason of these errors and omissions the plaintiffs in said several actions have not received the full amount of their respective claims.

Deponent says these errors in the adjustments may be accounted for from the fact that at the time these verdicts were in course of adjustment a very large number of other verdicts, some of which differed from the verdicts in these cases, were also in course of adjustment, and the clerks employed on the work may have mistaken the form of verdict.

A. HEYDENREICH.

Sworn before me this 27 day of December, 1876.

CHAS. LEE CLARKE,
Notary Public, N. Y. Co.

U. S. circuit court.

C. GIGNOUX ET AL.
vs. } & 22 others.
HEMAN J. REDFIELD,

SOUTHERN DISTRICT OF NEW YORK, *ss;*

Henry K. Murray, being duly sworn, says he is refund clerk in

11 the naval office, New York custom-house, and has been for near five years; that he has this day examined the entries, invoices, and papers in the case of William Loeschigk et al. vs. Greene C. Bronson, which was adjusted under the verdict on charges and commissions, and paid in the year 1861. That out of the entries by seventy-four vessels and steamers specified in the plaintiffs' bill of particulars served in the case, thirty entries which should have been included in such adjustment were omitted, and no part of the excess of duty paid by the plaintiffs on those entries was refunded in that case or has been since.

Deponent further says that he was not refund clerk at the time said case was adjusted.

H. K. MURRAY.

Sworn before me this 20th day of January, 1877.

A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

12 U. S. circuit court, southern district of New York.

ARMAND LACHAISE ET AL.
vs.
HEMAN J. REDFIELD. } And one other case.

By consent of counsel, the jury find a verdict for the plaintiffs for the amount, with interest, of the difference between duties paid under protest on commission at 2½ per cent. and such duties if levied on commissions at 2 per cent. on all importations specified in the bill of particulars from the continent of Europe (except Paris), and also for the difference between duties on 2½ per cent. commission and such duties if levied on 1½ per cent. commission on importations from Great Britain, except Yorkshire, and a like verdict for excess of duty paid under protest on the importations from the continent of Europe specified in the bill of particulars upon charges above those set forth in the report of Isaac Phillips, appraiser, dated , the amount to be adjusted by the collector of customs at New York, and to be reported to the clerk of this court.

Date of verdict, May 2nd, 1861.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al. vs. Heman J. Redfield and 22 other causes. Notice, motion, & affidavits. A. W. Griswold, pl'ffs' att'y, 120 Broadway. Filed Jan'y 27, 1877.

13 U. S. circuit court, southern district of New York.

A. LACHAISE ET AL.
vs.
HEMAN J. REDFIELD.

A motion having come on to be heard before this court in the above-entitled causes to open the judgments therein, now, on reading and filing notice of motion, dated December 27th, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich, on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiffs, and George Bliss, esq., U. S. district attorney, in opposition thereto, and due deliberation had, it is ordered, that the judgments entered in the above-entitled causes upon the verdicts therein be va-

cated, and that the assessments of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, esquire, as sole referee.

And it is further ordered, that the referee proceed to adjust de novo the plaintiffs' damages under said verdicts, in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases respectively, and that he report the balance, if any, found due the plaintiffs in each of said cases.

The said referee shall give notice to the attorneys of the respect-
14 ive parties of the time and place of hearing therein, and either party may, on the hearing, raise objections, and said referee shall decide thereon; and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring them to a hearing before the court upon four days' notice.

Dated January 26, 1877.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al. vs. Heman J. Redfield & 22 other causes. Order of reference. A. W. Griswold, pl'ffs' att'y. Filed Jan'y 27, 1877.

15 Circuit court of the United States for the southern district of New York.

A. LACHAISE ET AL.
vs.
HERMAN J. REDFIELD.

In pursuance of an order made in the above-entitled cause on the 26th day of January, in the year one thousand eight hundred and seventy-seven, by which it was referred to the undersigned to ascertain and report to this court whether, according to the verdict in said cause, anything, and, if so, how much, is due the plaintiffs in this cause for duties on charges and commissions beyond the amount awarded therefor by the former report in said cause:

Now I, John I. Davenport, to whom the matter was referred, do report, that I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiffs' claim, and do find that under the verdict in said
16 case there is now due the plaintiffs herein from the defendant, as collector of the port of New York, as and for duties on charges and commissions beyond the amount awarded therefor by the said former report, the sum of five hundred and three & $\frac{80}{100}$ dollars in gold and silver coin, or in Treasury notes issued under the authority of the United States, principal, and to interest on said sum from the date of payment to the date of this my report, amounting to eight hundred and five & $\frac{28}{100}$ dollars, amounting in the aggregate to the sum of thirteen hundred and nine & $\frac{78}{100}$ dollars, and that a statement of the said excess so paid by the said plaintiffs to the said defendant as and for duties on charges and as and for duties on commissions beyond the said amount heretofore awarded therefor, together with the interest due thereon, forming

part of this my report, is on file in the office of the collector of customs at the port of New York.

All of which is respectfully submitted.

Dated New York, February 26th, 1877.

JOHN I. DAVENPORT, *Referee.*

	503.80
17	805.98
	$1,309.78

Approved.

STEWART L. WOODFORD,
U. S. Attorney.

$38.

18 (Indorsed:) O. S. 354. U. S. circuit c't, southern district of New York. A. Lachaise et al. vs. Herman J. Redfield. Referee's report. John I. Davenport, referee. Filed M'ch 1, 1877.

19 U. S. circuit court.

A. LACHAISE ET AL.
vs.
HEMAN J. REDFIELD.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs came here into court, and, by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 1st day of November, 1859, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior
20 court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards and on the 27th day of February, in the year of our Lord one thousand eight hundred and sixty, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

21 And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the 1st day of November, one thousand eight hundred and fifty-nine, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of three thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request

of said defendant, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration
22 thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of three thousand dollars of lawful money as aforesaid.

And being so found in arrear and indebted to the said plaintiffs,
23 the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of three thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

24 And the said defendant, by the U. S. dist. att'y, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c. Therefore the issue above joined is ordered by the said court to be tried at a circuit court appointed to be held at the City Hall of the city of New York, on the 1st Monday of April in the year 1860. And now at this day, to wit, the 3d day of May, 1861, being as yet of the said April term before the said justices at the City Hall of the said city of New York, came the said parties by their attorneys aforesaid; and the said circuit judge, before whom the said issued was tried, has sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Wm. D. Shipman, esq., judge of the said circuit
25 court, came as well the within-named plaintiffs as the said defendant by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned also came, who to speak the truth in the matters within contained being chosen, tried, and sworn upon their oaths do say that the said defendant did undertake and promise in manner and form as the said plaintiff' ha' above thereof complained against him, and they assess the damages of the said plaintiffs by reason of the premises at the sum of

thirteen hundred and nine & $\frac{78}{100}$ dollars over and above their costs and charges by him above his suit in this behalf expended, and for those costs and charges the sum of seventy & $\frac{82}{100}$ dollars. Therefore it is considered that the said plaintiffs recover against said defendant
26 their damages aforesaid, by the jurors aforesaid, in form aforesaid found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent, which said damages, costs, and charges in the whole amount to thirteen hundred and eighty & $\frac{60}{100}$ dollars.

Judgment signed this 1st day of March, 1877.

1,309.78
70.82

1,380.60

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. A. Lachaise et al. vs. H. J. Redfield. Judgment roll. A. W. Griswold, pl'ffs' att'y. Filed March 1st, 1877.

27 U. S. circuit court, southern district of New York.

A. LACHAISE ET AL.
vs.
HERMAN J. REDFIELD, COLLECTOR, &c. } O. S. 354.

M. MITCHELL ET AL.
vs.
SAME. } O. S. 555.

At a stated term held in the court-rooms in post-office building in city of New York on the 10th day of September, 1877.

Present, his honor Samuel Blatchford, judge.

On reading and filing notice of motion herein, with admission of service and affidavit of J. Daud Jones, esq'r., assistant U. S. at-
28 torney, and after hearing Stewart L. Woodford, esq., U. S. attorney, in support of the motion, and A. W. Griswold, esq., of counsel for plaintiffs, in opposition thereto, it is ordered that certificates be entered in each of the above-entitled actions that the money for which the judgments were recovered herein was exacted by the defendant herein, or was paid to him, and was by him paid into the Treasury in the performance of his official duty as collector of the port of New York; and that he acted under the directions of the Secretary of the Treasury.

And it is further ordered that said certificates be entered nunc pro tunc as of the days when said judgments were severally recorded.

And it is further ordered that the executions heretofore issued against the property of the defendant herein be and the same are hereby stayed and set aside.

SAM'L BLATCHFORD.

29 (Indorsed:) U. S. circuit court, southern district of New York. O. S. 354. A. La Chaise et al. versus Herman J. Redfield, collector, &c. O. S. 555. M. Mitchell vs. The Same. Order granting certificate, &c., &c. Stewart L. Woodford, United States attorney.
187.

U. S. circuit court. Filed Sept. 13, 1877.

JOHN I. DAVENPORT, *Clerk.*

30 U. S. circuit court, southern district of New York.

A. LACHAISE ET AL. vs. HEMAN J. REDFIELD, } And three other cases.

It is hereby consented that an order be entered substituting Constance C. Redfield as executrix and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, as defendants in each of the four above entitled actions in place and stead of said Heman J. Redfield.

Dated Sept. 6, 1878.

ALMON W. GRISWOLD,
Per A. H.,
Att'y for Pl'ffs.

On the above consent of Almon W. Griswold, esq., attorney for the plaintiffs, and on the annexed petition of Constance C. Redfield, executrix, &c., and of Frank B. Redfield, executor, &c., and on the annexed affidavit of Stewart L. Woolford, esq., the attorney for defendants, and on the annexed surrogate's certificate and on motion of Stewart L. Woodford, esq., attorney for defendants, it is ordered, that each of the
31 four actions above entitled be, and the same is hereby, revived and continued, and that Constance C. Redfield as executrix and Frank B. Redfield as executor be and they hereby are substituted as defendants in the place and stead of Heman J. Redfield, deceased.

New York, September 10th, 1878.

(Signed) SAM'L BLATCHFORD.

Circuit court of the United States, southern district of New York.

In the matter of the petition of Constance C. Redfield as executrix and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, to be substituted as defendants in the actions mentioned in the list of actions annexed to said petition.

SIR: Please take notice that on the annexed petition, on the annexed affidavit of Stewart L. Woodford, attorney for the defendants, and on the annexed certificate of Hon. Lucius N. Bangs, surrogate, &c.,
32 the undersigned will move the court, at a stated term of said court to be held in the post-office building, in the city of New York, on the 10th day of September, 1878, at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order directing that the said Constance C. Redfield as executrix and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, be substituted in the place of Heman J. Redfield, late collector of customs at the port of New York, as defendants in the above named actions.

Dated New York.

United States circuit court, southern district of New York.

ARMAND LACHAISE & VICTOR FAUCHÉ vs. HEMAN J. REDFIELD. } And thirteen other cases. O. S. 354. (1.)

33 Circuit court of the United States, southern district of New York.

In the matter of the petition of Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, to be substituted as defendants in the actions mentioned in the list of actions annexed hereto.

The petition of Constance C. Redfield as executrix, and Frank B. Red-

field as executor of the last will and testament of Heman J. Redfield, deceased, shows to the court:

I. That at various times certain parties, as set forth in the list of actions hereto annexed, commenced said actions in this court against said Heman J. Redfield; that in each of said actions a judgment has been given by this court in favor of the plaintiffs and against said defendant.

II. That said Heman J. Redfield died on or about the 22d day of July, 1877, having first duly published his last will and testament, by
34 which, among other things, he appointed your petitioners his executrix and executor; that your petitioners have proved said will, and letters testamentary thereon were duly made and issued to them by the surrogate of the county of Genesee, in the State of New York, on on the 3d day of May, 1878, and that they have undertaken the execution thereof.

III. That your petitioners are desirous sueing out writs of error from the Supreme Court of the United States, as executor and executrix of the last will and testament of said Heman J. Redfield, deceased.

Wherefore, your petitioners pray that in said actions they may be so substituted as defendants, to wit: Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, and that they may have such further relief as may be just.

CONSTANCE C. REDFIELD, *Ex'tx.*
FRANK B. REDFIELD, *Ex.*

STATE OF NEW YORK,
County of Genesee, ss:

35 Constance C. Redfield of Batavia, N. Y., and Frank B. Redfield, of Batavia, N. Y., being severally and duly sworn, say, and each for himself says, that he has read the foregoing petition subscribed by him, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CONSTANCE C. REDFIELD.
FRANK B. REDFIELD.

Sworn before me this 31 day of July, 1878.

S. A. S. NEUVIN,
Notary Public.

Circuit court of the United States, southern district of New York.

STATE OF NEW YORK,
City and County of New York, ss:

Stewart L. Woodford, being duly sworn, says that he is United States attorney for said southern district of New York; that he was the attorney of Heman J. Redfield, in the actions mentioned in the list of actions annexed to the foregoing petition; that said actions were brought
36 against Heman J. Redfield late collector of customs at the port of New York, for the recovery of duties alleged to have been erroneously exacted by him in his official capacity as collector, &c., as aforesaid, from the several plaintiffs as aforesaid; that said Heman J. Redfield died on or about the 22 day of July, 1877, as this deponent informed and believes; that letters testamentary on the estate of said Heman J. Redfield, deceased, were granted to Constance C. Redfield and

Frank B. Redfield, both of Batavia, on the third day of May, 1878, as appears by the certificate of Hon. Lucius N. Bangs, surrogate of the county of Genesee, hereto annexed, dated first day of May, 1878.

STEWART L. WOODFORD.

Sworn to before me this ninth day of August, 1878.

[SEAL.] SUTHERLAND TENNEY,
Notary Public No. 52, New York County.

The people of the State of New York to all to whom these presents shall come or may concern, send greeting:

Know ye, that at our county of Genesee, on the third day of
37 May, in the year one thousand eight hundred and seventy-eight, letters testamentary upon the last will and testament of Heman J. Redfield, late of the town of Batavia, in the county of Genesee, deceased, were duly granted by the surrogate of our said county of Genesee, to Constance C. Redfield and Frank B. Redfield, and that the same are still valid and in full force.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness Lucius N. Bangs, esquire, surrogate of the county of Genesee, at the surrogate's office, in the town of Batavia, in said county, this first day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] LUCIUS N. BANGS,
Surrogate, &c.

(Endorsed:) U. S. circuit court, south. dist. of N. Y. In the matter of the petition of Constance C. Redfield, as executrix, and Frank B. Redfield, as executor, of the last will and testament of Heman J. Redfield, deceased, to be substituted as defendants in certain actions. Motion papers—order. Stewart L. Woodford, U. S. atty. & def't's att'y. Filed Sep. 12, 1878.

38 *Affidavit of service of copy of citation.*

U. S. Supreme Court.

CONSTANCE C. REDFIELD, AS EXECUTRIX, &C.,
against
ARMAND LA CHAISE & ANO.

SOUTHERN DISTRICT OF NEW YORK,
City and county of New York, ss:

Sidney Ormsby, being duly sworn, says he is a clerk in the office of Stewart L. Woodford, United States attorney; that on the 17' day of Sept., 1878, at the Coal and Iron Building, Courtland st., N. Y., he served a copy of the hereto annexed upon A. W. Griswold, att'y for pl'ffs in this action, by delivering said copy to A. W. Griswold personally, and leaving the same with him. And deponent further says he is over seventeen years of age.

SIDNEY ORMSBY.

Sworn to before me this 18' day of Sept., 1878.

[SEAL.] SUTHERLAND TENNEY,
Notary Public No. 52, N. Y. County.

39 UNITED STATES OF AMERICA, *ss:*

To Armand La Chaise and Victor Fauché and their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Constance C. Redfield, as executrix, and Frank B. Redfield, as executor, of the last will and testament of Heman J. Redfield, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Sept. 14, 1878.

SAM'L BLATCHFORD.

(Indorsed:) O. S. 354. U. S. Supreme Court. Constance C. Redfield, as executrix, and Frank B. Redfield, as executor, of the last will and testament of Heman J. Redfield, deceased, plaintiffs in error. against Armand La Chaise & Victor Fauché, defendants in error. Citation. Stewart L. Woodford, att'y for pl'ffs in error.

I hereby admit due service of a copy of the within.

Att'y for Def'ts in error.

78.

U. S. circuit court. Filed Sep. 18, 1878.

JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 1010. Constance C. Redfield as ex't'x & Frank B. Redfield as ex'r of H. J. Redfield, dec'd, late collector, &c., plaintiff in error, vs. Amanda La Chaise & Victor Fauché. S. New York C. C. U. S. Filed 2nd December, 1878.

14-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1012.~~ ~~662~~ ~~1614~~ 118

CONSTANCE C. REDFIELD, AS EXECUTRIX, AND FRANK B. REDFIELD, AS EXECUTOR, OF H. J. REDFIELD, DECEASED, PLAINTIFFS IN ERROR,

vs.

MONCRIEF MITCHELL, GIDEON POTT, AND JAMES POTT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 1012.

CONSTANCE C. REDFIELD, AS EXECUTRIX, AND FRANK B. REDFIELD, AS EXECUTOR, OF H. J. REDFIELD, DECEASED, PLAINTIFFS IN ERROR,

vs.

MONCRIEF MITCHELL, GIDEON POTT, AND JAMES POTT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Moncrieff Mitchell, Gideon Pott, and James Pott, plaintiffs, and Constance C. Redfield, as executrix, and Frank B. Redfield, as executor of the last will and testament of Heman J. Redfield, deceased, defendants, a manifest error hath happened, to the great damage of the said Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14 day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following papers numbered from three to thirty-eight, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Constance C. Redfield, as executrix, and Frank B. Redfield, as executor of the last will and testament of Heman J. Redfield, deceased, plaintiffs in error, against Moncrieff Mitchell, Gideon Pott, and James Pott, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) O. S. 555. U. S. Supreme Court. Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, plaintiffs in error, against Moncrieff

Mitchell, Gideon Pott, & James Pott, defendants in error. Writ of error. Stewart L. Woodford, att'y for pl'ffs in error.

I hereby admit due service of a copy of the within.

Att'y for Def'ts in Error.

'78.

U. S. circuit court, filed Sep. 18, 1878.

JOHN I. DAVENPORT, *Clerk.*

3 *Affidavit of service of copy of writ of error.*

U. S. Supreme Court.

CONSTANCE C. REDFIELD & AL.
against
MONCRIEFF MITCHELL & AL.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Sidney Ormsby being duly sworn, says he is a clerk in the office of Stewart L. Woodford, United States attorney; that on the 17 day of Sept., 1878, he served a copy of the hereto annexed upon A. W. Griswold, esq., in this action, by delivering said copy to A. W. Griswold personally, and leaving the same with him.

And deponent further says he is over seventeen years of age.

SIDNEY ORMSBY.

Sworn to before me this 17 day of September, 1878.

SUTHERLAND TENNEY,
Notary Public, No. 52, N. Y. County.

4 U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* Heman J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner et al. *vs.* Same.
J. S. Gourd et al. *vs.* Same.
S. Guillaume et al. vs. Same.
E. B. Strange et al. *vs.* Same.
E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
C. Payen et al. *vs.* Same.
John Syz et al. *vs.* Same.
H. Lewis et al. *vs.* Same.
F. Schuchhardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same 354.
J. W. Schulten et al. *vs.* Greene C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Speis et al. *vs.* Same.

L. Grossmann *vs.* A. Schell.
E. Warburg et al. *vs.* Same.
C. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* A. Schell.

SIR: Please take notice that upon the annexed affidavits and copies of verdicts, a motion will be made before a judge of this court on
5 the 30th day of December, 1876, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the judgments in the above-entitled causes be opened and the case referred to a referee, to ascertain and adjust the amounts due the plaintiffs under the verdicts in each of said cases respectively, and to report the facts so found by the referee to this court to be passed upon, and for such other and further relief as may be proper.

Dated Dec. 27th, 1876.

Yours, &c.,

ALMON W. GRISWOLD,
Pl'ff's Att'y.

To GEORGE BLISS, esq., *Def'ts Att'y.*

U. S. circuit court, southern district of New York.

C. Gignoux et al. *vs.* H. J. Redfield.
J. W. Schulten et al. *vs.* Same.
Wm. Brunner et al. *vs.* Same.
J. S. Gourd et al. *vs.* Same.
S. Guillaume et al. *vs.* Same.
E. B. Strange et al. *vs.* Same.
E. Warburg et al. *vs.* Same.
O. Zollikoffer et al. *vs.* Same.
C. F. Dambmann et al. *vs.* Same.
T. Passavant et al. *vs.* Same.
Ch's Payen et al. *vs.* H. J. Redfield.
Jno. Syz et al. *vs.* Same.
6 Henry Lewis et al. *vs.* Same.
F. Schuchardt et al. *vs.* Same.
M. Mitchell et al. *vs.* Same.
A. Lachaise et al. *vs.* Same.
J. W. Shulten et al. *vs.* G. C. Bronson.
Wm. Loeschigk et al. *vs.* Same.
F. A. Spies et al. *vs.* Same.
L. Grossman *vs.* Aug. Schell.
E. Warburg et al. *vs.* Same.
Chs. Payen et al. *vs.* H. Barney.
F. Schuchardt et al. *vs.* Augustus Schell.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

ALMON W. GRISWOLD, being duly sworn, says that the above entitled actions were brought to recover excess of duties paid on charges and commissions; that *the* they came on for trial and verdicts were rendered

for the plaintiffs, and judgments entered thereupon in the years 1860 to 1866, and that copies of the verdicts rendered in said cases are hereto annexed.

That the adjustments in all the cases but three appear to have been made by the collector of customs or Samuel G. Ogden, jr., auditor at the custom-house in this city, and the other three cases by the clerk of the court to whom the cases were referred for that purpose.

That these adjustments were made by said collector of customs and by said auditor and clerk of this court, and the reports based thereon were duly filed and judgments entered thereon, and subsequently paid and satisfied of record as follows, to wit:

7 In the cases of—

C. Gignoux et al. vs. H. J. Redfield, on March 3d, 1860.
J. W. Schulten et al. vs. Same, April 5th, 1860.
Wm. Brunner et al. vs. Same, December 30th, 1861.
J. S. Gourd et al. vs. Same, June 22nd, 1860.
S. Guillaume et al. vs. Same, May 15th, 1861.
E. B. Strange et al. vs. Same, February 13th, 1864.
E. Warburg et al. vs. Same, October 6th, 1860.
O. Zollikoffer et al. vs. Same, January 9th, 1860.
C. F. Dambmann et al. vs. Same, November 17th, 1863.
T. Passavant et al. vs. Same, April 30th, 1861.
C. Payen et al. vs. Same, November 24th, 1860.
John Syz et al. vs. Same, March 20th, 1861.
Henry Lewis et al. vs. Same, April 15th, 1863.
F. Schuchardt et al. vs. Same, June 9th, 1860.
M. Mitchell et al. vs. Same, Feb'y 13th, 1864.
A. Lachaise et al. vs. Same, June 10th, 1864.
J. W. Schulten et al. vs. G. C. Bronson, March 21st, 1860.
Wm. Loeschigk et al. vs. Same, April 9, 1861.
F. A. Spies et al. vs. Same, June 7th, 1861.
L. Grossmann vs. Aug. Schell, February 7th, 1866.
E. Warburg et al. vs. Same, August 18th, 1865.
Chs. Payen et al. vs. H. Barney, March 22nd, 1865.
Ferdinand Schuchardt et al. v. Aug. Schell, Jan'y 10th, 1865.

That early in 1864 deponent discovered that in the first fourteen of the above entitled actions errors had been committed and items omitted in the adjustment by which the plaintiffs in each had recovered

8 less than the amount due them under *under* the verdicts, and for the purpose of recovering the amounts thus erroneously omitted in such adjustments and judgments, new actions were commenced against the defendant Redfield on the 19th day of May, 1864.

To these actions the defendant interposes the plea of the statute of limitation, which defense, deponent is apprehensive, will prevail and thereby defeat the plaintiff's claims.

That as to the remaining cases this deponent had no knowledge or suspicion that the adjustments were not made in accordance with the verdicts, or that items embraced in the bills of particulars had been omitted until the recent adjustment of the cases of Chas. Payen et al. vs. Aug. Schell, Lewis Grossman et al. vs. Heman J. Redfield, and William Loeschigk et al. vs. Heman J. Redfiedd, and certain other cases, when it was discovered that mistakes had been made in the adjustment of the case of Ch's. Payen vs. Barney and L. Grossman vs. Schell, William Loeschigk et al. v. G. C. Bronson, and other cases, the verdicts in which were similar to those in the cases herein above named; upon readjust-

ing the verdicts in these cases, first above mentioned, it became necessary to examine the entries of the pl'ff's made to other collectors, and that disclosed the fact that omissions and mistakes had been made in the adjustments of these cases also, by omitting items embraced in bills of particulars, and also because of their not having been adjusted according to the verdict, one having been adjusted upon the basis of Phillips' report only, without the modification of Treasury instructions of May 21st, 1863, as provided in said verdicts, while as to the first twenty-two of said cases, the adjustments were not made according to Phil-
9 lips' report, as provided in the verdicts given in said cases, and items were omitted.

Deponent further says that by reason of these mistakes in the adjustments, there is still due the plaintiffs in the above entitled causes a portion of the money due them under said verdicts, for excess of duty paid on charges and commissions, and that such amounts cannot be ascertained without an examination of all the invoices and entries, and for that purpose the judgments should be opened, and the cases sent to a referee to have the amounts of the plaintiffs' damages in said causes readjusted according to the verdicts so rendered therein.

Deponent says that all the facts in said cases are precisely similar to those in the cases of J. W. Schulten et al. vs. Aug. Schell, Louis Grossmann vs. H. J. Redfield, C. Payen et al. vs. Aug. Schell, and in which the judments were opened by order of this court in the first case on June 20th, 1871, and in the other cases on Aug. 13th, 1873, and the cases referred to a referee and readjusted according to the verdict therein.

ALMON W. GRISWOLD.

Sworn before me this 27th day of December, 1876.

CHAS. LEE CLARKE.
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Augustus Heydenreich, being duly sworn, says the adjustment in 20 of the above entitled cases were made at the custom-house under the direction of the collector of the customs, or the auditor of the
10 customs, and in three cases by the clerk of this court or his deputy.

Upon investigation deponent finds that the adjustment in the above-entitled cases were not made according to the verdicts, and also that items were omitted in said adjustments which were embraced in the bills of particulars, & should have been included therein; and by reason of these errors and omissions the plaintiffs in said several actions have not received the full amount of their respective claims.

Deponent says these errors in the adjustments may be accounted for from the fact that at the time these verdicts were in course of adjustment a very large number of other verdicts, some of which differed from the verdicts in these cases, were also in course of adjustment, and the clerks employed on the work may have mistaken the form of verdict.

A. HEYDENREICH.

Sworn to before me this 27 day of December, 1876.

CHAS. LEE CLARKE,
Notary Public, N. Y. Co.

U. S. circuit court.

C. GIGNOUX ET AL.
vs.
HEMAN J. REDFIELD. } & 22 other cases.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry K. Murray, being duly sworn, says he is refund clerk in
11 the naval office, New York custom-house, and has been for near five years; that he has this day examined the entries, invoices, and papers in the case of William Loeschigk et al. vs. Greene C. Bronson, which was adjusted under the verdict on charges and commissions, and paid in the year 1861.

That out of the entries by seventy-four vessels and steamers specified in the plaintiffs' bill of particulars served in the case, thirty entries which should have been included in such adjustment were omitted, and no part of the excess of duty paid by the plaintiffs on those entries was refunded in that case, or has been since.

Deponent further says that he was not refund clerk at the time said case was adjusted.

H. K. MURRAY.

Sworn before me this 20th day of January, 1877.

A. HEYDENREICH,
Notary Public, Richmond Co., N. Y.

12 M. MITCHELL ET AL.
vs.
HEMAN J. REDFIELD.

MONDAY, *June 9th*, 1862.

Present: Judge Smalley.

By consent of counsel, the jury find a verdict for the plaintiffs in the above-entitled cause for excess of duty paid on commissions over one and a half per centum under protest on importations of dry goods from Great Britain embraced in the plaintiffs' bill of particulars. The amount, with interest, for which judgment shall be entered, is to be computed according to this verdict by the collector of customs.

13 U. S. circuit court, southern district of New York.

M. MITCHELL ET AL.
vs.
HEMAN J. REDFIELD.

A motion having come on to be heard before this court in the above-entitled cause to open the judgments therein: now, on reading and filing notice of motion dated December 27th, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiffs, and George Bliss, esq., U. S. district attorney, in opposition thereto, and due deliberation had, it is ordered, that the judgments entered in the above-entitled causes upon the verdicts therein be vacated, and that the assessments of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, esquire, as sole referee.

And it is further ordered, that the referee proceed to adjust de novo the plaintiffs' damages under said verdicts, in accordance therewith,

and from the amounts found due, if any, he deduct the sums paid upon the judgments heretofore entered in each of said cases respectively, and that he report the balance, if any, found due the plaintiffs in each of said cases.

The said referee shall give notice to the attorneys of the respec-
14 tive parties of the time and place of hearing therein, and either party may, on the hearing raise objections, and said referee shall decide thereon; and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring them to a hearing before the court upon four days' notice.

Dated January 26, 1877.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. C. Gignoux et al. vs. Heman J. Redfield, & 22 other causes. Order of reference, A. W. Griswold, pl'ffs' att'y. Filed Jan'y 27, 1877.

15 Circuit court of the United States for the southern district of New York.

M. MITCHELL ET AL.
vs.
HEMAN J. REDFIELD. } O. S. 555.

In pursuance of an order made in the above entitled cause on the 26th day of January, in the year one thousand eight hundred and seventy-seven, by which it was referred to the undersigned to ascertain and report to this court whether, according to the verdict in said cause, anything, and if so, how much, is due the plaintiffs in this cause for duties on charges and commissions beyond the amount awarded therefor by the former report in said cause.

Now I, John I. Davenport, to whom the matter was referred, do report: That I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiffs' claim, and do find that under the verdict in said case there is now due the plaintiffs herein from the defendant, as collector of the port of New York, as and for duties on charges and commissions beyond the amount awarded therefor by the said former report,
16 the sum of three thousand and thirty & $\frac{50}{100}$ dollars in gold and silver coin, or in Treasury notes issued under the authority of the United States, principal, and to interest on said sum from the date of payment to the date of this my report, amounting to forty-five hundred and eighty-nine & $\frac{14}{100}$ dollars, amounting in the aggregate to the sum of seventy-six hundred and nineteen & $\frac{64}{100}$ dollars, and that a statement of the said excess so paid by the said plaintiffs to the said defendant as and for duties on charges, and as and for duties on commissions beyond the said amount heretofore awarded therefor, together with the interest due thereon, forming part of this my report, is on file in the office of the collector of customs at the port of New York.

All of which is respectfully submitted.

Dated New York, March 7th, 1877.

JOHN I. DAVENPORT,
Referee.

$3,030.50.
4,589.14.

$7,619.64.

$101.20.

(Endorsed:) U. S. circuit court, southern dist. of New York. M. Mitchell et al. vs. Heman J. Redfield. Referee's report. John I. Davenport, referee. Filed M'ch 7, 1877.

17 U. S. circuit court.

M. MITCHELL ET AL.
vs.
HERMAN J. REDFIELD.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 5th day of April, 1862, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court.

18 That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had, that afterwards, and on the 2d day of May, in the year of our Lord one thousand eight hundred and sixty-two, the said action was in due form of law removed by writ of certiorari, for further prosecution and trial, into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court according to the course and practice of this court, which allegations and suggestions the defendants does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

19 For that whereas the said defendant, on the 1st day of July, one thousand eight hundred and fifty-three, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of five thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received, to and for the use of the said plaintiffs. And being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully
20 promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and

then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of five thousand dollars of lawful money as aforesaid.

And being so found in arrear and indebted to the said plaintiffs, the said defendant in consideration thereof afterwards, to wit, on the
21 same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, &c., has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof to the said plaintiffs, the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of five thousand dollars, and therefore the plaintiffs bring suit, &c.

A. W. GRISWOLD.
Attorney for Plaintiffs.

And the said defendant, by the U. S. dist. att'y, his attorney, comes and defends the wrong and injury, &c., and says that he did not
22 undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c.

Therefore the issue above joined is ordered by the said court to be tried at a circuit court appointed to be held at the city hall of the city of New York on the 1st Monday of April in the year 1862.

And now at this day, to wit, the 9th day of June, 1862, being as yet of the said April term, before the said justices, at the city hall of the said city of New York, came the said parties by their attorneys aforesaid; and the said circuit judge, before whom the said issued was tried, has sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before D. A. Smalley, esq., judge of the said circuit court, came as well the within-named plaintiffs as the said defendant by their
23 respective attorneys within mentioned; and the jurors of the jury whereof mention is within made being summoned also came, who to speak the truth in the matters within contained, being chosen, tried, and sworn upon their oaths, do say that the said defendant did undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs by reason of the premises at the sum of seventy-six hundred and nineteen & $\frac{64}{100}$ dollars over and above their costs and charges by him about his suit in this behalf expended, and for those costs and charges the sum of one hundred and seventy-four & $\frac{96}{100}$ dollars.

Therefore it is considered that the said plaintiffs recover against said defendant their damages aforesaid by the jurors aforesaid in form aforesaid found, and also their costs and charges of increase by the
24 court now here adjudged to the said plaintiffs with their assent,

which said damages, costs, and charges in the whole amount to seventy-seven hundred and ninety-four & $\frac{60}{100}$ dollars.

Judgment signed this 17th day of March, A. D. 1877.

J. M. DEUEL,
Dep. Clerk.

7,619.64
174.96
———
7,794.60

(Endorsed:) U. S. circuit court. M. Mitchell et al. vs. Heman J. Redfield. Judgment roll. A. W. Griswold, pl'ffs att'y. Filed March 17, 1877.

25 U. S. circuit court, southern district of New York.

A. LACHAISE ET AL.
vs.
HERMAN J. REDFIELD, COLLECTOR, &c., } O. S. 354.

M. MITCHELL ET AL.
vs.
SAME. } O. S. 555.

At a stated term held in the court room in post office building, in city of New York, on the 10th day of September, 1877.

Present, his honor, Samuel Blatchford, judge.

On reading and filing notice of motion herein, with admission of service, and affidavit of J. Dana Jones, esq., assistant U. S. at-
26 torney, and after hearing Stewart L. Woodford, esq., U. S. attorney, in support of the motion, and A. W. Griswold, esqr., of counsel for plaintiffs in opposition thereto, it is ordered that certificates be entered in each of the above-entitled actions that the money for which the judgments were recovered herein was exacted by the defendant herein, or was paid to him, and was by him paid into the treasury in the performance of his official duty as collector of the port of New York; and that he acted under the directions of the Secretary of the Treasury.

And it is further ordered that said certificates be entered nunc pro tunc as of the days when said judgments were severally recorded.

And it is further ordered that the executions heretofore issued against the property of the defendant herein be and the same are hereby stayed and set aside.

SAM'L BLATCHFORD.

27 (Indorsed:) U. S. circuit court southern district of New York. O. S. 354. A. La Chaise et al. versus Herman J. Redfield, collector, &c. O. S. 555. M. Mitchell vs. The same. Order granting certificate, &c., &c. Stewart L. Woodford, United States attorney.

U. S. circuit court. Filed Sept. 13, 1877.

JOHN I. DAVENPORT,
Clerk.

28 U. S. circuit court, southern district of New York.

M. MITCHELL ET AL.
vs.
HEMAN J. REDFIELD. } (And three other cases.)

It is hereby consented that an order be entered, substituting Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, as defendants in each of the four above-entitled actions in place and stead of said Heman J. Redfield.

Dated Sept. 6, 1878.

ALMON W. GRISWOLD,
Per A. H.
Att'y for Pl'ff's.

On the above consent of Almon W. Griswold, esq., attorney for the plaintiffs, and on the annexed petitions of Constance C. Redfield, executrix, &c., and of Frank B. Redfield, executor, &c., and on the annexed affidavit of Stewart L. Woodford, esq., the attorney for defendants, and on the annexed surrogate's certificate, and on motion of Stewart L. Woodford, esq., attorney for defendants, it is ordered that each
29 of the four actions above entitled be, and the same is hereby revived and continued, and that Constance C. Redfield as executrix, and Frank B. Redfield as executor be, and they hereby are substituted as defendants in the place and stead of Heman J. Redfield, deceased.

New York, September 10, 1878.

(Signed) SAM'L BLACHFORD.

Circuit court of the United States, southern district of New York.

In the matter of the petition of Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, to be substituted as defendants in the actions mentioned in the list of actions annexed to said petition.

SIR: Please take notice that on the annexed petition on the annexed affidavit of Stewart L. Woodford, attorney for the defendants, and on the annexed certificate of Hon. Lucius N. Bangs, surrogate, &c.,
30 the undersigned will move the court at a stated term of said court to be held in the post-office building in the city of New York on the 10th day of September, 1878, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order directing that the said Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, be substituted in the place of Heman J. Redfield, late collector of customs at the port of New York, as defendants in the above-named actions.

Dated New York.

United States circuit court, southern district of New York.

MONTCRIEFF MITCHELL, GIDEON POTT, & James Pott *vs.* HEMAN J. REDFIELD.	(And thirteen other cases.) O. S. 555. (2.)

31 Circuit court of the United States, southern district of New York.

In the matter of the petition of Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, to be substituted as defendants in the actions mentioned in the list of actions annexed hereto.

The petition of Constance C. Redfield as executrix, and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, shows to the court:

I. That at various times certain parties, as set forth in the list of actions hereto annexed, commenced said actions in this court against said Heman J. Redfield; that in each of said actions a judgment has been given by this court in favor of the plaintiffs and against said defendant.

II. That said Heman J. Redfield died on or about the 22d day of July, 1877, having first duly published his last will and testa-
32 ment, by which, among other things, he appointed your petitioners his executrix and executor; that your petitioners have proved said will, and letters testamentary thereon were duly made and issued to them by the surrogate of the county of Genesee, in the State of New York, on the 3d day of May, 1878, and that they have undertaken the execution thereof.

III. That your petitioners are desirous sueing out writs of error from the Supreme Court of the United States, as executor and executrix of the last will and testament of said Heman J. Redfield, deceased.

Wherefore your petitioners pray that in said actions they may be so substituted as defendants, to wit: Constance C. Redfield as executrix and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased; and that they may have such further relief as may be just.

CONSTANCE C. REDFIELD, *Ex'tx.*
FRANK B. REDFIELD, *Ex.*

STATE OF NEW YORK,
County of Genesee, ss:

Constance C. Redfield, of Batavia, N. Y., and Frank B. Redfield, of Batavia, N. Y., being severally and duly sworn, say, and
33 each for himself says, that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CONSTANCE C. REDFIELD.
FRANK B. REDFIELD.

Sworn before me this 31 day of July, 1878.

S. A. S. NERWIN,
Notary Public.

Circuit court of the United States, southern district of New York.

STATE OF NEW YORK,
City and County of New York, ss:

Stewart L. Woodford, being duly sworn, says that he is United States

attorney for said southern district of New York; that he was the attorney of Heman J. Redfield in the actions annexed to the foregoing petition; that said actions were brought against Heman J. Redfield, late collector of customs at the port of New York, for the recovery of duties alleged to have been erroneously exacted by him in his official
34 capacity as collector, &c., as aforesaid, from the several plaintiffs as aforesaid; that said Heman J. Redfield died on or about the 22 day of July, 1877, as this deponent is informed and believes; that letters testamentary on the estate of said Heman J. Redfield, deceased, were granted to Constance C. Redfield and Frank B. Redfield, both of Batavia, on the third day of May, 1878, as appears by the certificate of Hon. Lucius N. Bangs, surrogate of the county of Genesee, hereto annexed, dated first day of May, 1878.

STEWART L. WOODFORD.

Sworn to before me this ninth day of August, 1878.
[SEAL.] SUTHERLAND TENNEY,
Notary Public, No. 52 New York County.

The people of the State of New York to all to whom these presents shall come or may concern send greeting:

Know ye, that at our county of Genesee, on the third day of May, in the year one thousand eight hundred and seventy-eight, letters testamentary upon the last will and testament of Heman J. Redfield,
35 late of the town of Batavia, in the county of Genesee, deceased, were duly granted by the surrogate of our said county of Genesee, to Constance C. Redfield and Frank B. Redfield, and that the same are still valid and in full force.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto affixed. Witness Lucius N. Bangs, esquire, surrogate of the county of Genesee, at the surrogate's office, in the town of Batavia, in said county, this first day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] LUCIUS N. BANGS,
Surrogate, &c.

(Endorsed:) U. S. circuit court, south. dist. of N. Y. In the matter of the petition of Constance C. Redfield as executrix and Frank B. Redfield as executor of the last will and testament of Heman J. Redfield, deceased, to be substituted as defendants in certain actions. Motion, papers, order. Stewart L. Woodford, U. S. att'y & def't's att'y. Filed Sep. 12, 1878.

36 *Affidavit of service of copy of citation.*

U. S. Supreme Court.

CONSTANCE C. REDFIELD, AS EXECUTRIX, &C.,
against
MONCRIEFF MITCHELL ET AL.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Sidney Ormsby, being duly sworn, says he is a clerk in the office of Stewart L. Woodford, United States attorney; that on the 17th day of

Sept., 187 , at the Coal & Iron Building, Courtlandt st., N. Y., he served a copy of the hereto annexed upon A. W. Griswold, att'y for pl'ffs in this action, by delivering said copy to A. W. Griswold personally and leaving the same with him.

And deponent further says he is over seventeen years of age.

SIDNEY ORMSBY.

Sworn to before me this 18th day of September, 1878.

[SEAL.] SUTHERLAND TENNEY,
Notary Public, No. 52, N. Y. County.

37 UNITED STATES OF AMERICA, *ss:*

To Moncrieff Mitchell, Gideon Pott, and James Pott, and their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Constance C. Redfield, as executrix, and Frank B. Redfield, as executor of the last will and testament of Heman J. Redfield, deceased, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Sept. 14, 1878.

SAML. BLATCHFORD.

(Indorsed:) O. S. 555. U. S. Supreme Court. Constance C. Redfield, as executrix, and Frank B. Redfield, as executor of the last will and testament of Heman J. Redfield, deceased, plaintiffs in error, against Moncrieff Mitchell, Gideon Pott, & James Pott, defendants in error. Citation. Stewart L. Woodford, att'y for pl'ffs in error.

I hereby admit due service of a copy of the within.

Att'y for Def'ts in Error.

'78.

U. S. circuit court. Filed Sep. 18, 1878.

JOHN I. DAVENPORT, *Clerk.*

(Indorsment on cover:) No. 1012. Constance C. Redfield, as ex't'x, & Frank B. Redfield, as ex'e'r, of H. J. Redfield, dec'd, late collector, &c., plaintiff in error, vs. Moncrief Mitchell, Gideon Pott, & James Pott. S. New York C. C. U. S. Filed 2 December, 1878.

O

Sub

Submitted 2nd Dec.

14-420

The findings and the opinion reduce the substance of the whole case. See p 25. 27. 28.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 163.

HIRAM QUINBY, PLAINTIFF IN ERROR,

vs.

ANDREW CONLAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 24, 1879.

Post until next Saturday

SUPREME COURT OF THE UNITED STATES.

No. 163.

HIRAM QUINBY, PLAINTIFF IN ERROR,

vs.

ANDREW CONLAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 In the supreme court of the State of California.

ANDREW CONLAN, PLAINTIFF AND RESPONDENT,
vs.
HIRAM QUINBY, DEFENDANT AND APPELLANT.
} No. 6116.

TRANSCRIPT ON APPEAL.

A. J. King and J. R. McConnell, attorneys for appellant; John D. Bicknell, attorney for respondent.

Filed June 17th, 1878. D. B. Woolf, clerk, by H. P. Bush, deputy.

2, 3 *Complaint in ejectment.*

In the district court of the seventeenth judicial district, State of California, in and for the county of Los Angeles.

ANDREW CONLAN, PLAINTIFF,
vs.
HIRAM QUINBY, DEFENDANT.

The plaintiff above named complaining of the defendant above named, for cause of action alleges:

That on the 10th day of April, A. D. 1875, the said plaintiff was the owner and seized in fee and possessed and entitled to the possession of that certain lot of land situate in the county of Los Angeles, State of California, and described as follows, to wit:

The west half of the northwest quarter and southeast quarter of northwest quarter of section number thirty (30), township number
4 two (2) south, of range number thirteen (13) west, S. B. M.

That when the plaintiff was such owner, and so seized and possessed and entitled to the possession of the said land and premises, the said defendant did on the day and year aforesaid wrongfully and unlawfully, and without right of title, enter into and upon the same and oust and eject the plaintiff therefrom, and ever since that day wrongfully and unlawfully has withheld, and still and now wrongfully and unlawfully does withhold, the possession thereof from the plaintiff, to his wrong, injury, and damage in the sum of one thousand dollars.

That the value of the rents and profits on the said land and premises is five hundred dollars per year, and that by reason of the unlawful withholding of the said land by the defendant, as aforesaid, plaintiff has been deprived and by the continuance thereof will be deprived of the use and occupation of the same, to his loss and damage in the sum of one thousand dollars.

Wherefore the plaintiff prays judgment against the said defendant for the restitution of said land and premises, and for the sum of one thousand dollars damages for the withholding thereof, and one
5 thousand dollars damages caused by the loss of the value of the rents and profits thereof, together with his costs of suit.

JOHN D. BICKNELL,
Attorney for Plaintiff.

Filed September 4th, 1876.

Answer to plaintiff's complaint.

[Title of court and cause.]

The defendant for answer to the complaint of plaintiff in the above-entitled action denies:

That said plaintiff was on the 10th day of April, A. D. 1875, or at any other time before or after said date, or ever or at all, seized in fee or possessed of, or entitled to the possession of the land and premises in the complaint of plaintiff described, or any part or parcel thereof.

Denies that he, the said defendant, on the said 10th day of April, A. D. 1875, or at any other time before or after the said date, ousted or ejected the said plaintiff from the land and premises in the said complaint described or any part or parcel thereof.

Denies that he withheld the land and premises in said complaint described from plaintiff to his injury or damage in the sum of one thousand dollars, or in any other sum whatever.

6 Denies that the rents and profits of said land are of the value of five hundred dollars per year.

Denies that by reason of the withholding of said land and premises by the defendant, the said plaintiff was deprived of the use of the same or any part or parcel thereof, or that plaintiff was damaged by the defendant's withholding the same in the sum of one thousand dollars, or in any other sum whatever.

And for a special answer and plea in bar to said action in this behalf the said defendant answers:

That on, to wit, the day of , 1875, the said plaintiff commenced an action in the said district court against said defendant for the recovery of the premises described in the complaint in this action. That summons was duly issued in said action, and duly served on this defendant, who thereupon, that is to say, on the day of , 187 , duly appeared in said action, and then and there made answer to the complaint therein. That the parties to said action (plaintiff and defendant) were identical with the parties to this action. That the subject matter of said action and the issues of fact and of title joined for trial therein were and are identically the same with the subject matter and issues made and title involved in the present action. That

7 all of such issues can and, if the said cause proceeds to trial, will be tried and disposed of in such action, and that the same is still pending and wholly undisposed of in the said district court.

Wherefore defendant prays judgment of this said action, and that the same may by the judgment of this court be wholly quashed and dismissed.

And for a further and separate and equitable defense to said action, and for a cross complaint and for affirmative relief, the defendant avers:

First. That prior to and up to the 15th day of June, A. D. 1872, the land and premises in plaintiff's complaint described were and remained to said date unsurveyed public lands of the United States.

Second. That the defendant and those under whom he claims, and whose title he has by mesne conveyances settled upon, used, occupied, and improved the same, holding and occupying the said land adverse to the said plaintiff from the year 1862 to the present time, and still so holds, occupies, and cultivates the same.

Third. That one Perfete settled upon the west half of the northwest ten quarter of sec. 30 of township No. 2 south, range number thir-

8 teen W., S. B. M., being 80 acres of land described in the complaint

of plaintiff, in the year 1862, in good faith, intending to preempt the same as soon as the said land should be surveyed and declared to be subject to pre-emption by settlers thereon, and occupied and cultivated the same continuously for two years, residing thereon with his family, and made improvements on said land during his said occupancy of the value of $300.

Fourth. That about the last of December, 1864, or the 2nd of January, the said Perfete conveyed the said 80 acres by deed of conveyance for valuable consideration to one Benjamin Rebbeck, who took immediate possession thereof, resided thereon with his family, and improved and cultivated the whole thereof, and continued to reside on and cultivate the same until about the month of October, in the year 1867, when for a valuable consideration he sold and conveyed the same to one Lorenzo Fogle; that said Fogle entered into the possession of the said 80 acres of land, resided thereon with his family, occupied, cultivated, and improved the same continuously until about the 4th day of March, 1869, when he, the said Fogle, by deed of conveyance, and for a valuable consideration, conveyed the same to the defendant, Quinby.

9 That defendant, Quinby, has occupied, cultivated, and improved said 80 acres of land continuously since said last mentioned date to the beginning of this action, residing thereon with his family, and has made valuable and permanent improvements on the same of the value of more than one thousand dollars, and has paid yearly the State, county, and school taxes assessed thereon, and is still residing thereon and cultivating and improving the same.

Fifth. The defendant, further answering, avers: That James Edwards and wife were in or about the year 1862 part owners and tenants in common with others in the rancho "Sausal Redondo," a private Mexican land grant, which included in its exterior boundaries the east half of the northwest quarter of sec. 30, T. 2 S., R. 13 W., S. B. M., which said tract includes the southeast quarter of the northwest quarter of said sec. 30, the same being forty acres of the land described in plaintiff's complaint; that said Edwards and wife conveyed the said forty acres of land last above described to one Alexander Nelson, by deed of date of about October 14th, 1865, for a valuable consideration, and said Nelson entered into the possession of the same and occupied and cultivated the whole thereof until, for a valuable consideration, he, the said Nelson, conveyed the same by deed of conveyance, and

10 for a valuable consideration, to one Richard Chapman, and that the said Chapman, by deed of date July 31st, 1868, for a valuable consideration, conveyed the said forty acres of land to one Lorenzo Fogle, and that said Fogle thereafter, by deed of conveyance, and for a valuable consideration, conveyed the said forty acres of land to the defendant, Quinby; that he, the said Quinby, has occupied and cultivated the whole of the said forty acres of land from the date of its conveyance to him by the said Fogle, viz, about December, 1868, to the present time, and still occupies and cultivates the same.

Sixth. That all of the grantors of the defendant, Quinby, occupied, cultivated, and improved the said forty acres of land and the said eighty acres of land in complaint of plaintiff described in good faith during the times of their several possessions and occupancy, and that the whole of the land described in plaintiff's complaint was in the possession of the defendant and those under whom he claimed from the year 1862 until the commencement of this action, holding, occupying, and claiming the same adverse to the said plaintiff, and is still so held and claimed by the defendant.

11 Seventh. That defendant, further answering, avers:

That he is a qualified pre-emptor (and citizen of the United States) under the laws regulating the settlement of and pre-emption of government lands, and that he has never, before the date of his settlement on the land in the complaint in this action described, had the benefit of the pre-emption laws of the United States, or exercised his right to pre-empt lands thereunder.

That he in good faith took up the lands described in plaintiff's complaint under the possessory "act" of the State of California on the 27th day of December, A. D. 1868. That he occupied the same prior to that date, and has occupied and cultivated the same ever since, and still doth occupy and cultivate the same. That on the 23rd day of November, 1871, the said defendant filed in the land-office of the Los Angeles district for the United States his declaratory statement, alleging his previous settlement upon said land in manner prescribed by law. That on the date of filing such statement he, the said defendant, was and from thence up to the present time hath been living upon, occupying, cultivating, and in the actual possession of the said tract of land

12 and premises. That he, the said defendant, hath, during the period in which he hath had the possession as aforesaid, expended large sums of money in erecting dwelling-houses and in making other improvements upon the said premises. And that his said predecessors, whose right, estate, and possession he hath, did each, during the period of their respective possession and occupancy, expend large sums of money and much labor in erecting and making such improvements.

For further answer the defendant avers: That notwithstanding the occupancy, cultivation, and possession of said land and premises by him, the said defendant, and those whose estate he hath, in good faith and with the full intent and purpose to pre-empt and purchase the same, yet that the said plaintiff has fraudulently endeavored, and is still so fraudulently endeavoring, to deprive him, the said defendant, of his right and pre-emption claim in and to said land and premises. That the said plaintiff hath never at any time had any possession or occupancy of said land and premises described in the complaint of plaintiff, or any part or parcel thereof, and especially that he had no such possession or occupancy up to and before or on the 25th day of May, 1868.

13 That notwithstanding the foregoing facts the said plaintiff, on the 25th day of May, 1868, while the said land and premises were in the actual occupation and possession of the said Fogle, whose estate the defendant now hath, proceeded to file his declaratory statement in the land-office aforesaid, in which said statement he, the said plaintiff, falsely and fraudulently alleged a settlement by him, the said plaintiff, on the land and premises in said complaint described on the 4th day of February, A. D. 1865, when in truth and in fact the only settlement and occupation ever had of said premises before that time was that made and had by the grantors of the said defendant.

That said plaintiff fraudulently concealed from said defendant and his grantors aforesaid, who were then in possession of said premises, his intention to so file on said premises and the fact of his so filing, though plaintiff well knew at the time of such filing and before that time of the occupation and possession of said premises by defendant's grantors, and of their intention to continue to hold, occupy, and to pre-empt and purchase said premises. That by reason of the concealment aforesaid, defendant and his grantors were induced to believe, and did believe, that no person had or asserted a claim to the said premises adverse to or hostile to their own.

14 That prior to the year 1871 it had been claimed by certain parties that the premises in question were a part of the "Sausal Redondo" rancho, a private Mexican land grant, and not a part of the public domain, or subject to settlement and pre-emption. That though defendant and those whose estate he hath did, at all times during their said occupancy, intend to pre-empt and purchase the said premises, should they prove to be a part of the public landsof the U. S., yet they were compelled to wait, as they were advised, until by action of the proper officers of the government the character of the said premises had been settled. That for this reason, and the further reason that the plat and survey of the said township was suspended by the proper officers of the land department of the United States, the defendant did not file his declaratory statement in the said land office until the year 1871, but that the plaintiff, for the sole purpose of defrauding the said defendant and his said grantors, fraudulently, falsely, and secretly filed his said declaration at a time when it had by no means been determined whether or not said premises were open to pre-emption and purchase. That notwithstanding the foregoing facts and things, the officers of the General Land Office of the United States upon a question of right be-
15 tween said plaintiff and defendant, involving the rights respectively of plaintiff and defendant to pre-empt and purchase said land and premises, having mistaken the law governing in such cases, erroneously and wrongfully decided that the said plaintiff, as between him and the said defendant, had the better right, and was entitled upon completing the payments therefor required by law to a certificate of entry and purchase and patent therefor. That the said officers of the land office, as aforesaid, were directly moved to and influenced in making their said decision on the said question of right between said plaintiff and defendant, by the false and untrue statements of the said plaintiff, made under oath before said officers, to the effect that he, the said plaintiff, was at the time of the filing of his said declaratory statement and prior thereto in the possession of and occupying the land and premises in plaintiff's complaint described, and by other false testimony produced by said plaintiff at the said hearing, and by the said officers heard and considered, in favor of the said plaintiff and against the said defendant, and his, the said plaintiff's, fraudulent practices and impositions upon the said officers, he, the said plaintiff, caused the said
16 officers to mistake the law governing the said cause, and to make a wrong and erroneous decision thereon.

That by reason of the false testimony of plaintiff, and his fraudulent acts, statements and procurements, at the said hearing before the said United States land officers, they, the said officers, then and there being influenced and induced so to do by the false statements and testimony aforesaid, permitted the said plaintiff to pre-empt and purchase the said land and premises, and the register and receiver of the United States land office for the district of Los Angeles, California, issued to the said plaintiff a certificate of purchase for the said land.

That defendant is informed and believes that upon the certificate so procured by the false testimony and fraudulent acts and statements of plaintiff and others, and the mistakes of the said officers in the law governing the same, and their erroneous decision thereon and wrong construction of the said law, a patent has been issued to said plaintiff for the said lands signed by the President of the United States. And the said defendant avers that he has paid into court for and on account of said plaintiff the sum of one hundred and fifty dollars in lawful money of the United States, that being the amount paid by said

17 plaintiff to the Government of the United States for and on account of said land, and the said defendant further hereby offers to pay all the lawful expenses incurred by said plaintiff in obtaining the patent of the United States to said land, and to that end prays that an accounting be ordered and had of said costs and expenditures by said plaintiff. That by reason of the premises the said plaintiff in equity and good conscience holds the said patent and the legal title conveyed thereby to him, for the use and benefit of and in trust for the said defendant.

Wherefore, in consideration of the premises, and the foregoing facts, the said defendant prays judgment of the court. That said plaintiff be ordered, adjudged and decreed to hold whatever right or title by virtue of the said certificate of purchase, or of the said patent issued thereon or thereafter, or which he, the said plaintiff, may now have or hereafter acquire from the United States, by virtue of said certificate of purchase, or any proceedings thereon, be held in trust for him, the said defendant; and furthermore, that said plaintiff be adjudged, ordered and directed, by the decree of this court, to convey whatever title or estate he may now have or hereafter acquire to the said premises by or through his said certificate of purchase, or patent from the United States, to
18 the said defendant by a good and sufficient deed of conveyance, and for his costs in this behalf expended, and for such other and further relief as to the court may seem just and proper.

WHITING & KING AND
JOHN R. McCONNELL,
Attorneys for Defendant.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Hiram Quinby, being first duly sworn, makes oath and says that he is the defendant in the above entitled action; that he has heard read the foregoing answer and cross-complaint, and knows the contents thereof; that he knows the same to be true of his own knowledge except as to the matters therein stated on information and belief, and as to those things he believes it to be true.

HIRAM QUINBY.

Subscribed and sworn to before me this 18th day of September, 1876.
[NOTARIAL SEAL.] A. J. KING,
Notary Public.

Service of a copy acknowledged this 20th day of September, 1876.
JOHN D. BICKNELL,
Attorney for Plaintiff.

Filed Sept. 20th, 1876.

19 *Reply to cross complaint.*

[Title of court and cause.]

The plaintiff herein appears and demurs to the cross-complaint herein filed, and for cause of demurrer alleges that said cross-complaint does not state facts sufficient to constitute a cause of action.

Said plaintiff further appears and for reply to said cross-complaint denies that the lands in controversy were, prior and up to June, 1872,

unsurveyed public land, but alleges the facts to be that said land was duly surveyed by the United States Government in the month of 1868, and the township plat in which the lands in controversy are situate, was duly filed in the United States Land Office on the 22nd day of April, 1868.

Said plaintiff denies that said defendant and those under whom he claims, by mesne conveyance or otherwise, or that any other person, except as hereinafter admitted, settled upon and held and occupied said land or any part thereof adverse to this plaintiff, or in any manner whatever, from the year 1862 until the present time, but said plaintiff alleges the facts to be that on or about the 4th day of February, 1865,

he entered upon and took possession of the N. W. ¼ of sec. 30, T.
20 2 S., R. 13 W., S. B. M., which includes the land in controversy,

for the purpose and with the intention of pre-empting the same under the laws of the United States; that at the time of his entry on said lands there was no one residing thereon, and that he took possession of said lands at that time for the purpose above stated; that subsequent to his said entry upon said lands the parties named in defendant's cross-complaint wrongfully entered upon the lands described in the complaint, but none of them, as this plaintiff is informed and believes, ever claimed said lands as pre-emptors or sought or intended in any manner to acquire title to said lands from the Government of the United States except the defendant herein.

Said plaintiff denies that one Perfete or any other person settled upon any part of the land in controversy in the year 1862 intending or for the purpose of pre empting said lands or any part thereof at any time.

Said plaintiff denies that one Benjamin Rebbeck or any other person except this plaintiff took possession of any part of the lands in controversy in December, 1864, or in January, 1865, or at any time before the day of April, 1865.

Plaintiff denies that any part of the land in controversy in 1862
21 or at any time or was ever included within the boundaries of the

rancho Sausal Redondo or any other Mexican grant.

Plaintiff denies that he has heretofore, or at any time, or does now fraudulently or with any purpose of wronging or defrauding the defendant or any other person seek to deprive the defendant or any other person of his or their rights as pre-emptors or otherwise to said lands, but said plaintiff alleges the facts to be as heretofore alleged. That he entered upon and tock possession of said quarter section of land on the 4th day of February, 1865; that at that time there was no person in possession of said lands or any part thereof except this plaintiff; that at the time of his entry thereon said lands were unsurveyed government land; that subsequent thereto the same was surveyed and the official township plat or map of T. 2 S., R. 13 W., S. B. M., was on the 22nd day of April, 1868, filed in the United States land office of San Francisco, in which said land district the land in controversy was at that time situate.

That on the 28th day of May, 1868, plaintiff filed his declaratory statement in said land office in due form, according to law, alleging settlement on said lands, as hereinbefore alleged. That subsequent there-

to, in the year 1872, a contest was had in the United States Land
22 Office between plaintiff and defendant as to which had the bet-

ter right to pre-empt said lands, and at said contest both plaintiff and defendant appeared and introduced proof as to their respective claims to said lands, and the said land department, by the Hon. Secretary of the Interior, before whom said case had been appealed, on the 22nd day of August, 1874, decided said controversy and awarded said

lands to the plaintiff herein, and the United States Government subsequently issued to and delivered to this plaintiff a patent for said quarter section of land of the date as alleged in the complaint herein, by which said patent the plaintiff became the owner and seized in fee of said quarter section of land.

Said plaintiff denies that his allegations in his said declaratory statement filed in the United States Land Office, alleging settlement on said lands in February, 1865, or in any other respect was false or fraudulent, but on the contrary plaintiff alleges that the same were true in every particular, and plaintiff denies that he fraudulently, or in any manner, concealed from the defendant or his grantors, or any other person, his intention to file on said premises, but on the contrary alleges that before the defendant, Quinby, entered upon said lands or made any claim thereto, that this plaintiff notified him in person
23 that he claimed said lands, and had filed his claim in the United States Land Office. as a pre-emptor to the said quarter section of land, and said plaintiff alleges that the defendant entered upon said land with full knowledge of the claims made to said lands by this plaintiff, as hereinbefore alleged.

Plaintiff denies that he fraudulently or secretly filed his said declaration with the intention or for the purpose of defrauding the defendant or any other person, but on the contrary alleges that said filing was done openly and in good faith, for the purpose of acquiring title to said lands from the United States Government, and at a time when said lands had been ascertained to be public lands of the United States. Said plaintiff denies that the officers of the General Land Office in awarding said lands to the plaintiff herein, and deciding that the said plaintiff had the better right to pre-empt said lands as against the defendant, mistook the law governing such cases, or that their said decision was erroneous and wrongful, but on the contrary plaintiff alleges that their said decision was according to law and just, and that said lands belonged to said plaintiff, and he had, as against said defendant, the better right to pre-empt said lands.

24 Plaintiff denies that any of the statements made by said plaintiff, or any of his witnesses, before the said officers of said land department in the said controversy between plaintiff and defendant as to their rights to purchase said lands, under oath or otherwise, were false or untrue, or that he in any manner deceived or misled said officer, and denies that they were misled in any manner by the plaintiff or any of his witnesses or any other person, or at all by any statements made before them at any time, or at all, but on the contrary plaintiff alleges that the decision of said land department in awarding said lands to this plaintiff was in accordance with the law and the facts, and just and equitable.

Plaintiff denies that he holds the said patent issued to him for said lands by the United States Government and the legal title thereof conveyed in trust for the defendant or any other person, but on the contrary alleges that he holds the same in his own right and for his own use and benefit.

Wherefore plaintiff prays judgment against the defendant and that judgment may be entered herein according to the prayer of the plaintiff's complaint.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

25 Andrew Conlin, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action. I have heard read the above answer and know the contents thereof, and the same is true of my own knowledge except the matters therein stated on information or belief, and as to those matters I believe it to be true.

ANDREW CONLIN.

Subscribed and sworn to before me this 14th day of October, 1876.
[NOTARIAL SEAL.] H. O. BICKNELL,
Notary Public.

Due service acknowledged this 14th day of October, 1876.
WHITING & KING,
Attorneys for Defendant.

Filed October 14th, 1876.

"EXHIBIT A," PLAINTIFF.

U. S. SURVEYOR-GENERAL'S OFFICE,
San Francisco, Cal., February 7th, 1868.

SIR: With this I forward a contract for the subdivision of the townships below designated, viz:

Tps. 2 and 3 S., R. 13 W., and Tps. 2 and 3 S., R. 14 W., San Bernardino meridian.

In making the survey of these townships you will set off within the boundaries of the latter the line of five square leagues in satisfac-
26 tion of the grant of Sausal Redondo confirmed to A. Y. Abila in accordance with the accompanying instructions and the 8th section of the act of Congress, approved July 23rd, 1866, entitled "An act to quiet land titles in California."

Very respectfully,

L. UPSON,
U. S. Surveyor-General.

GEORGE HANSEN, esq.,
U. S. Deputy Surveyor, Los Angeles, Cal.

U. S. SURVEYOR-GENERAL'S OFFICE,
San Francisco, Cal., February, 1868.

SIR: Whereas in the claim of Antonio Y. Abila to the tract of land hereinafter described the United States district court for the southern district of California had affirmed the decision of the board of land commissioners, and notice is given by the Attorney-General of the United States that no appeal will be further prosecuted therein, I have thought proper to appoint you my deputy in this special case for the execution of the final survey thereof.

The decree of court above referred to confirming the lands known by the name of "Sausal Redondo" and "Guaspita," being the same
27 lands granted by J. B. Alvarado, May 20th, 1837, and situated in the present county of Los Angeles, and being of the extent and within the boundaries of the map which accompanies his original petition to the governor for the said lands, reference being had for more particular description to the said original grant of said lands and the said map belonging thereto, filed in this cause and copied in said transcript.

Provided that the lands contained within said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity.

The original grant in this case describes the land as follows:

1st. There is conceded to the citizen Antonio Egno Abila the tract of land called "Sausal Redondo" and "Guaspita," which he actually occupies, &c., without prejudice to the pasture lands of the city, as it has not marked out the commons (Ejidos).

2nd. That if the land to which reference is made in the foregoing article should be comprehended within the Ejidos, of which mention is made, the grantee shall be subject to pay the ground rent which
28 imposed on it. A copy of the map referred to is herewith given you.

No application having been made for the survey of this rancho within ten months after the passage of the act of Congress approved July 23rd, 1866, entitled "An act to settle land titles in California," you are hereby instructed to set off the same as contemplated by said act. The map or deseno is by the decree of the court the governing paper; it contains according to scale thereon about five square leagues. The petition to the board of land commissioners was for that quantity. The "Guaspita" is the portion bordering on the "Ballona" rancho. You will retain the three boundaries called for on the deseno, viz, the Ballona, Marand, San Pedro, and after connecting the "Aguajide Centinella" in accordance with the views of the office, adopt the southern line thereof as the line of this rancho and extend the eastern or closing line so far east as to embrace the old house of Abila, near the spring of Centinella.

Very respectfully,

L. UPSON,
U. S. Surveyor-General.

To GEORGE HANSEN, Esq.,
U. S. Deputy Surveyor.

29 *Statement on motion for new trial.*

[Title of court and cause.]

Be it remembered that this cause came on to be tried before the said district court on the day of January, 1878, upon the cross-complaint of the defendant and the answer thereto, and the evidence there introduced by the respective parties.

And a jury being sworn, then and there came, and was duly sworn to try the issues and a verdict thereon to duly render. Whereupon the said defendant, to prove the issues on his part, introduced before the said jury the following evidence, viz:

BENJAMIN REBBECK, called and sworn on the part of the defendant, testified substantially as follows:

Know the land in controversy; have known it since the summer of 1864; knew a man named Perfete, a Mexican, in 1864 and 1865; he resided on the land during the year 1864; dug a large ditch, and made a bank for a fence, and built an adobe house. I purchased the possessary interest of Perfete in the early part of January, 1865. When I paid for the land, Mr. Chapman, a lawyer, was present, and said a deed was not

necessary; that all I wanted was possession; but he wrote out a paper showing how much I paid Perfete for the land; but I threw
30 away, as Chapman said a deed was unnecessary. I don't recollect the contents of the paper; it merely specified the land and what I paid for it; I paid Perfete $50.00 for the land; took some lumber that had been used for a floor in the house of Jim Edwards, and made temporary roof for the house (the one built by Perfete), and moved in the house. There was no one living there or upon the land at the time It was the west half of the northwest quarter of sec. 30, township No. 2 S., R. 13 W., S. B. M. I know it was in the early part of January, 1865, when I moved into the house; cannot tell the exact date; recollect from circumstances. I went upon the land in good faith, intending to settle and pre-empt it if it should become government land. It was claimed as a part of the Sausal Redondo rancho at that time, but was supposed to be government land; of course there was a dispute about the rancho title. Those who had settled on portions of the grant claim were contesting the grant and contending that it was government land. When I took possession there was a ditch dug around three sides of about sixty acres; I had the ditch opened; built a roof on the adobe house; had the house partitioned off into new rooms; put in windows and doors; built a kitchen the whole length of the house; put a pole fence
31 around three sides of the sixty acres and ditched the other side, fixed a well and put in a pump. I put the pole fence on the top of the bank made by Perfete and cultivated the whole field the first year. I continued to occupy and cultivate the land until the latter part of the year 1867. The first year I did not raise a very good crop; in 1866 it was dry; in 1867 I raised a good crop of barley and wheat. The improvement I made upon the land cost me about $600. I am acquainted with the entire quarter section—northwest quarter of sec. 30. There was no person living on it when I took possession, but Jim Edwards had a pole fence on a portion of the east half of the quarter; it was on the southeast quarter of the northwest quarter of the section. Edwards had 160 acres adjoining this land. I sold the land to Lorenzo Fogle in the latter part of the summer of 1867, after the barley was off. I gave him a deed for it; the deed was made out by a man named Still, a justice of the peace and a surveyor. Fogle paid me $200 for the land. I do not know what became of the deed; I delivered it to Fogle in the office of Mr. Still—the deed was acknowledged. I knew Andrew Conlan. The first time I ever saw him he was passing down on the inside of the fence on the east eighty with Jim Edwards, early one morning,
32 and my wife was standing in the door; we had then been on the place long enough to get all our land plowed. I was in the field when he passed down; pretty soon after that Conlan put a house on the land; the house was made up of all kinds of little pieces of odd boards washed down the San Gabriel River; they were of all lengths, sizes, and shapes. The house was on the northeast half of the east eighty. Perfete cultivated the land before I bought it of him.

On cross-examination witness testified in substance as follows:

I made the purchase from Perfete after I went to the place of Edwards. I must have been there a part of November and December, might be a week or so in January, 1865. He charged a month and a half board for the time the boys boarded with him. I did not live in the house with Edwards. I went to see the grain, and sometimes stayed over night. I am positive I made the purchase from Perfete in January,

1865, because I reccollect being with Jim Edwards, and how long I was in the house. I bought in January, 1865, and went into possession, immediately afterwards went there myself. I moved in the next day after I bought. I took the part (lumber) I had for a floor, made a shelter of it and fixed the roof afterwards. I moved in when there was only
33 a part of the roof on the house. The Perfete house is not far from the Edwards house; it is right on the boundary line of one quarter, a little piece of the line. I reccollect fixing the roof. I did the work myself. I got some timber from the mountains. I got it after I had moved into the house. I saw Conlan while I was fixing the roof, before that I saw him with Edwards. I had not completed the house when he went down with Edwards. It was some time after I moved in the house before I completed the roof. I came in town and got some shakes—cannot tell when I completed the roof, possibly in March or near February. I know it was very cold and windy. My family and myself were living there before the completion of the roof. I made it my home as soon as ever I bought the place. The house that Conlan built was something less than half a mile from the Perfete house. I had two or three cows down there before I moved on the Perfete place, made a corral *from* them on the Edwards place. I rented land from Edwards. My boys did work for me there. I went every other day in November and December to see about it. In January I bought the Perfete place and moved upon it with my family.

LORENZO FOGLE, called, sworn and examined as a witness on
34 the part of the defendant, testified substantially as follows:

Knew H. Quinby and A. Conlan, know the land in controversy, the west ½ of the NW. ¼ and the southeast ¼ of the northwest ¼ of section 30, township 2 south, range 13 west, S. B. M.; have known it for 10 or 12 years. My home is now at the Green Meadows. I work at the Monte. I think I resided at Green Meadows in 1864 and 1865 in Los Angeles County; it was called six-mile house; was acquainted with the tract of land called six-mile place, known as six-mile house; first knew the land in controversy about twelve years ago, it may have been more. I think Jim Edwards had possession at that time, afterwards Nelson and then Rebbeck; I cannot tell the exact time Rebbeck took possession; I had possession after him; I bought it of Rebbeck; think I paid him $200; I bought 80 acres of him; that 80 acres was the west ½ of the northwest ¼ of sec. 30; at the time I bought that 80 there was no one in possession of it but Rebbeck, nor did any one else claim it. Mr. Conlan lived close by, and said to me, "I am very glad you bought it; I want a neighbor." He had, I believe, ten or twenty acres, and said, "That is all I want." I took a deed from Rebbeck; I don't know what became of the deed; I left it a lawyer named Larrabee. I never knew what became of the deed; I never
35 placed it on record. The 20 acres Conlin had was on the northwest corner of the quarter, the upper corner; he (Conlin) had 20 acres there, which he bought and fenced. I think they gave him 20 acres more; that made 40 acres—being the northeast lot of the ¼ section; thinks he bought the twenty acres from Nelson Conlin; made a line of fence, Nelson furnishing the poles, and it was a division line between Conlin and Nelson. After I bought the 80 acres and improvements from Rebbeck, I bought 40 acres from Mr. Chapman across the road from the house. The 40 acres I bought of Chapman adjoins the line fence of Conlin and adjoins the line of the eighty acres I bought of Rebbeck. The four parties were all on one quarter section. I bought

the eighty from Rebbeck first, and the forty from Chapman afterwards. It was the southeast forty; paid him five hundred dollars for it. Mr. Larrabee was my attorney when I bought from Rebbeck. I took a deed from Chapman for the forty. Larrabee drew the deed. I was in the possession of the whole one hundred and twenty acres; bought eighty from Rebbeck and forty from Chapman; do not know what became of the Chapman deed. Mr. Conlin did not claim it when I bought.

36 The one hundred and twenty acres is the land in controversy; think I gave all the papers to Mr. Larrabee at the time I bought the eighty from Rebbeck. Conlin was not in possession of any part of it. He occupied the 20 acres he bought of Mr. Nelson, and never claimed any more. He did not claim the forty acres; never claimed a foot of the 80 or 40 tracts when I bought. Since it became valuable, he has claimed it. I had possession of the land about a year and a half. During that time Conlin made no attempt to cclaim, take possession of, or cultivate any portion of the 80 or of 40 acre tract. He claimed only what he bought, and did not want any more. When I bought the 40 of Chapman, Conlin said to me, "Fogle, you are a fool to buy of Chapman; you will get the land anyhow, and you are fooling your money away." I cultivated the land during the time I had possession. Before Mr. Rebbeck went on the place (the 80) it was in the possession of a man by the name of Perfete, who built an adobe house there. He had a family. He lived on the 80 I bought from Rebbeck. The house he built is there yet. He dug a well and dug ditches for fences to keep the stock out. In that manner he fenced about 40 acres. At the time Perfete dug these ditches there was no one else on the land.

37 Perfete remained on the land a year or two. Mr. Rebbeck, while he occupied the land, cultivated the whole of the 80 in corn and barley. When I bought it was all in crop. I sold to Mr. Quinby; cannot now tell the time of the year. I gave Quinby a deed. I sold him 120 acres. (Here counsel for plaintiff admits that Fogle bought the 40 referred to from Chapman.)

On cross-examination the witness testified substantially as follows:

I forget what year I went upon the land. I lived there about a year and a half. Mr. Quinby went into possession when I sold to him. The conversation I had with Conlin, in which he told me he only wanted twenty acres, was before I bought of Rebbeck, during the time I occupied the land. He never notified me to vacate my possession and deliver the possession of the land to him, nor did he claim it. He never notified me to leave that place; never claimed a foot of it. Neither Mr. Edwards nor Mr. Nelson ever lived on this land, but they claimed the forty on which Conlin lives, and had it fenced in when they sold him that twenty acres.

On redirect examination, the witness testified substantially as follows:

Question. During the time of your occupancy and cultivation of the land, were you doing so in good faith, with intention to pre-empt it?

38 (Objected to by counsel for plaintiff, on the grounds that they have closed with the witness on the direct examination, and because it is irrelevant and immiterial. Overruled by the court. It tends to explain his former testimony on cross-examination.)

Answer. Yes, sir. Am an American citizen.

E. P. PASSMORE, sworn on the part of the defendant, testified substantially as follows:

In January, 1865, I resided in Wilmington, Los Angeles County. In

February of that year I was travelling between here and San Pedro. I traveled on the direct road between here and San Pedro, by way of the six-miles house; know the land in controversy. The west half of the northwest quarter and the southeast quarter of the west quarter of section number 30, T. 2 S., R. 13 west, S. B. M., but do not know its boundaries; know Mr. Rebbeck; have known him since 1868; know of his living upon a piece of land near the six-mile house in 1865; first saw him there on 12th or 13th of February, 1865. He (Rebbeck) was living in an adobe just this side of the six mile house. I have seen the land since then. The adobe house is still there. It is the same Rebbeck was living in at the time. Am not acquainted with Conlin, the plaintiff in this case; have seen him; knew of no person living in the immediate vicinity of Rebbeck except Edwards, who lived below. There
39 was no house north of where Rebbeck then lived within two or three or four hundred yards on the left hand side of the road as you went towards Wilmington or coming towards town; have been shown the house that it was stated Colin lived in; don't know whether he lives there or not. At the time I became acquainted with Rebbeck, in February, 1865, there was no house where the present house pointed out to me as that of Conlin is, nor was there any house within an hundred and fifty yards or so of that place, nor in the immediate vicinity. I drove a team by the land, and was compelled to pass the place every other day. I made a trip from San Pedro to Los Angeles every day. I drove there ten months.

On cross-examination witness testified substantially as follows:

All that time I was in the employ of Tomlinson and Company, forwarding and commission merchants; do not remember hauling any lumber during that time and delivering it upon the place referred to. I hauled lumber from the beach up here. Do not recollect that my employers sent a part of a load of lumber to Conlin by me, at any time they did not do so. It is possible, but I would probably have remembered it. I remember seeing Rebbeck on the place on the 12th
40 or 13th of February, because it was right away after I went work there, and I remember when I went to work there—I went to work there on the 12th of February. The six-mile house was where Mr. James Edwards lived; it is house spoken of as the Edwards' place. Edwards was living there at time I commenced work. Did not notice whether there was a family there or not. Saw Edwards there, and think I saw his wife. Never measured the ground, but the house where Rebbeck lived was about three hundred yards from that of Rebbeck, from my recollection at that time. I saw the place a few days ago; did not know that it had anything to do with my testimony. I was simply asked to look at the place; don't know whether it was the plaintiff or his counsel who asked me. I am positive Mr. Rebbeck was there, because I stopped there a few days afterwards to get a little buttermilk. They had some cows and I used to stop there frequently to get milk. At the time I first Rebbeck and his family there the roof of the house was not completed. It was partially open.

A. L. TOFFLEMEYER, sworn on part of defendant, testified substantially as follows:

In the winter of 1864 and the early part of 1865 I resided principally on the road between here and San Pedro. I was driving stage
41 for Tomlinson & Co.; drove on the road past the six-mile house, half-way house, and from there to Wilmington and San Pedro.

Know Benjamin Rebbeck; have known him since the winter of 1864 and 1865. Know where he resided at that time, in the fall of 1864, in Jim Edwards' house, commonly called the six-mile house, and in the winter he went into house built by an old Spaniard, just this side of the Edwards' house, and resided there up to a few years afterwards. Don't know when he went out of it. He had possession of the house some time about Christmas. I know the rain had commenced pretty hard. The house had been covered with corn stalks when the Spaniard lived in it, and Rebbeck put a board roof on it. Know the land in controversy, but am not positive as to the exact boundaries of it. The house is 300 or 350 yards this side of the Edwards house. I know when it was built. I know Mr. Conlin; he was in that vicinity about three years. I never knew that he was living there in the winter of 1864 and 1865. At that time there was no one living on that road from the mouth of the lane (city limits) and the half-way house of Tomlinson but Rebbeck and Edwards; they were the only houses on that stage and wagon road during that fall and winter. I know where Mr. Conlin lived while I was driving on that road; in that fall and winter there was
42 no house in that immediate vicinity. There was no house there at all. I drove over the road twice a day for two years; the country was not settled; and if there had been any improvements I would have noticed them.

On cross examination witness testified substantially as follows:

I know when Rebbeck moved into the Perfete house; it was just after the first rain that year, which occurred in the middle of December or first of January; the rain kept off very late. I recollect about the rainstorm, and Rebbeck going into the house; I am positive there was no house north of the Perfete house on that section in the winter of 1864 and 1865, in that vicinity. I first saw a house there in the spring of 1865; it was on the right-hand side of the road as you go down, and looked like a corn-crib; it was probably four hundred yards this side of Perfete house. The Perfete house and the six-mile house were on the right-hand side of the road going down; was on that road from 1862 to '65 all the time. Went on the San Bernardino road on the 12th of May or June, 1865. The shanty, or corn-crib, was put upon the land while I was gone to Workman's, about the 15th of April, 1865, and when I came back with horses I noticed the corn-crib. This shanty was about 250 yards from where Conlin now lives, on the oppo-
43 site side of the road.

Being recalled by defendant, testified substantially as follows:

Do not know who built the corn-crib; I first saw it in the month of April, 1865.

Henry Rebbeck, sworn on the part of the defendant, testified substantially as follows:

Know Benjamin Rebbeck; know Mr. Conlin. I resided in the fall of 1864 at the old six-mile house. I know the land in controversy; I lived on it about three years; have known it since 1864. When I first knew it there was a Mexican named Perfete living on it. My father bought it from him; he took possession sometime in the year 1865; cannot tell the time. There was no one on it when he took possession. Mr. Conlin did not take possession of any portion of the land during the three years I resided there. He bought 20 acres inside of the fence from Jim Edwards, and then claimed another 20 outside. That was after my father took possession; cannot tell how long it was afterwards; not long, how-

ever. Have been acquainted with the land since I lived there; know where Mr. Conlin's house now is. At the time my father took possession there was no house there in that vicinity or within a few hundred yards of there; there was nothing but an old pole fence around the field that Jim Edwards claimed; cannot tell when I first knew Conlin;
44 it was getting dry when he commenced to plow.

On c'oss-examination witness testified substantially as follows:

Before my father bought the 80 of Perfete I lived on the Jim Edwards place; did know Conlan while I lived there. Heard the testimony of my father; do not recollect when the rains commenced that year; do not remember the exact date my people moved into the Perfete house. I never saw Conlin until after my people moved into the house. I recollect its raining before we had the house fixed up. We had possession of the place before we moved into the house; cannot tell when Conlin purchased those 20 acres; only knew of it by hearsay. I recollect Mr. Edwards and Mr. Nelson speaking of a discharged soldier coming there to buy 40 acres of land; it was after we moved on the place. I testified before the land office in this case. My testimony there was substantially what it is here.

Deposition of E. HADLEY, read on the part of defendant, is substantially as follows:

I am fifty-two years old; reside in Los Angeles County, California; have resided here since 1855; am a lawyer by profession; know Andrew Conlan and Alexander Nelson; have known Conlan since 1866, and Nelson since 1864. I surveyed land for Nelson the 18th day of
45 December, 1866, at the request of Conlan. I run him out 20 acres. It was in Los Angeles County, south of Los Angeles City, township 2 south, range 13 west. Conlan now lives on the same piece of land I surveyed for him; has lived there ten or twelve years.

Question by counsel for the defendant: Did you have any conversation with Mr. Conlan in reference to the amount of land he claimed to own? If so, state the conversation with Mr. Conlan.

(Objected to by the plaintiff as irrelevant and immaterial, on the ground that the plaintiff in this action having purchased the land in controversy from the United States Government and received a certificate of purchase therefor, as well as the patent of said land from the United States, and all questions between this plaintiff and defendant as to their rights to pre-empt said land having been fully determined by the United States authorities, and the land awarded to the plaintiff, no question of fact can be enquired into in this action that was necessarily passed upon by the United States authorities before they could award the same to plaintiff.)

Answer. The conversation was general between Conlan, Nelson and myself. Mr. Conlan was at work down in the field; Mr. Nelson
46 told Mr. Conlan that Hadley had come up to survey the claim off that Nelson bought of Edwards. I think there was 120 acres. Nelson told Conlan it was a good time to have his surveyed, and Conlan said, "Survey me off twenty acres; that is all I want."

Question. State if you heard Mr. Nelson say to Conlan that he might take twenty acres more; if so, state what Conlan said at the time.

(Objected to by plaintiff.)

Answer. I did. Conlan said twenty acres was all he wanted.

The southern line was intended as a division line between Conlan and Nelson. It was the southern line of Conlan's land and the north-

western line of Nelson's tract, and was in the NE. quarter of sec. 30, and the twenty acres he refused was north of the twenty acres surveyed for him.

JAMES WHITWORTH, sworn on the part of defendant and examined, testified substantially as follows:

Know plaintiff and defendant; know the land in controversy; have known it for twelve or fourteen years. The first person I knew it to be in possession of was Perfete, and Rebbeck was in possession of it after him. Am intimately acquainted with Rebbeck and his family.
47 Rebbeck is a brother-in-law of mine. Rebbeck was in possession of the land in the early part of 1865, eighty acres on the west side of the San Pedro road. Do not know where the house of Conlan is now situated; know where he built his first house. Mr. Rebbeck was in possession of the eighty acres when Conlan built his first house; Mr. Rebbeck was living there previous to Conlan going to live there. I know this because I frequently visited the Rebbeck family there.

H. QUINBY, sworn and examined on the part of the defendant, testified substantially as follows:

Am the defendant in this action.

(Counsel for plaintiff admits that witness on the land in controversy reside on the land in controversy.)

Am a citizen of the United States and a qualified pre-emptor of the public lands of the United States. Have never availed myself of the benefit of the pre-emption laws, and not the owner of 320 acres of land, outside of the land now sought to be pre-empted by me.

ALEXANDER NELSON, sworn and examined on the part of the defendant, testified substantially as follows:

I reside in Green Medows, Los Angeles County; have resided there eighteen years; know the plaintiff and defendant in this action;
48 know the land in controversy in this action—the west half of the northwest quarter and the southeast quarter of the northwest quarter of section 30, township 2 south, range 13 west, S. B. M. Have testified before in this case; know the land well. In 1865 I bought the southeast forty of the land in controversy; it belonged then to what is called the six-mile house farm. James Edwards took peaceable possession of it. There was a line on the north between Conlan and myself. Conlan consented to have the line surveyed; I employed E. Hadley to survey it; the line was surveyed to his satisfaction and mine. It took off the northeast forty of the land in controversy. I proposed to Conlan that if he would put up a fence I would furnish the poles; he built the fence as per agreement; it stands there now, between the northeast forty and the southeast forty of the quarter section, the N. W. quarter of sec. 30. I sold my portion of it to Richard Chapman and he sold the southeast forty to Lorenzo Fogle, and Fogle sold it to Hiram Quinby. Conlan claimed twenty acres on that quarter section which he bought of James Edwards; the quarter section was surveyed on the 11th day of February, 1866. At the time the survey was made I told Conlan he could take up all the land he wanted on the north of him, as it
49 was vacant government land, and he replied, "I don't want more than twenty acres; it is all I can cultivate;" that he had all the land he wanted (and that he would not pay taxes on land he could not cultivate), and the line was settled between him and myself. I was present at the survey of the line between Conlan and myself. Was present

and heard a conversation between Mr. Hadley and Conlan in relation to the survey of that land. Heard Conlan tell Hadley that he only claimed twenty acres; that was all he wanted. The conversation between Hadley and Nelson as stated in the deposition of Hadley is correct. I heard it. I bought 160 acres of Edwards—it was in three forties lying north and south on the east side of the old San Pedro road and another forty adjoining to the center forty, where the old six-mile house stands, making the land in the shape of a T. I bought one forty in the quarter on which Quinby lives. I have known the eighty upon which the adobe house stands, the west eighty of the northwest quarter, about twenty-seven years; knew Perfete; knew him to be in the possession of that eighty; he was in possession two years; saw him there first in 1863. He sold to Mr. Rebbeck. I was not acquainted with Mr. Rebbeck when he first went down on the land; heard of his being
50 there in December of 1864, but did not see him. Have known Conlan since the beginning of 1865. First knew him at my house. Think Conlan settled upon the land in February.

On cross-examination the witness testified substantially as follows:

At the time I speak of this land had not been surveyed by the United States; the survey made between me and Conlan was made in February, 1866. The fence was the division line between Conlan and myself, and was so agreed upon by us. I resided at the six-mile house in 1866; took possession there about the beginning of November, 1865.

ALFRED JAMES, called, sworn and examined on the part of the defendant, testified substantially as follows:

Am the register of the U. S. Land Office; have been in office since 1872; have examined my record in relation to the land in dispute. It is the west half of the northwest quarter of section 30, township 2, range 13 W. S. B. M; also the southeast forty of the same quarter, 120 acres. There was a survey of the Sausal Redondo rancho, the land in dispute; cannot tell when it was made; the plat was suspended until 1871—from May 22nd, 1868, until November 21st, 1871—in consequence of the claim of the Sausal Redondo. The survey of the rancho
51 was finally approved by the department October 31st, 1871, and excluded this land. The township plat was again suspended March 18th, 1872, and finally restored on the 11th of June, 1872. The declaratory statement of Quinby was filed November 23rd, 1871, 2 days after the restoration of the plat; it was filed within time required by law. The township plat was ordered filed by the Secretary of the Interior November 21st, 1871, and upon that filing the survey became final. A suspension prevents the action of the local land office from receiving applications to file, either under the homestead or pre-emption laws; they are treated as though no survey had been made or plat filed. The general understanding in the office was that the suspension was made pending the final determination of the Sausal Redondo rancho.

On cross-examination witness testified substantially as follows:

Conlan filed his declaratory statement May 25th, 1868. The Interior Department passes upon the surveys, and their actions are not of record here. Suspending a township plat in the practice of the Land Office means withdrawing the land from private entry, or from any kind of entry.

52 R. M. WIDNEY, called, sworn, and examined on part of defendant, testified substantially as follows:

Am an attorney-at-law. Sometime in the year 1868 I attended a meeting of persons interested in defeating the Thompson survey of the Sausal Rodondo grant. They agreed to pay twenty cts. per acre for the amount claimed as counsel fees. My impression is, and that impression is a strong one, I made a written statement at the time, and had occasion to examine it about a year ago; and my recollection is that Conlan only claimed and paid upon forty acres. I became connected with them as their attorney; kept a written account of the amount paid by each.

GEORGE W. WHITEHORN, called, sworn, and examined on the part of the defendant, testified substantially as follows:

Reside in Los Angeles City; have resided in the city since 1847. My occupation since 1854 has been that of teaming; know the "six-mile" house; knew a man named Perfete. He built the foundation of an adobe house about a half a mile north of the "six-mile" house, and made the sides and roof of mustard stalks; dug a ditch around about thirty acres of land. He lived in the house about two years, from 1862 to 1864. Understand he sold to Rebbeck. Saw Rebbeck living
53 there from late in the year 1864 up to 1866. I drove by there constantly until the opening of the Wilmington Railroad. Know Mr. Conlan; know where he first built his shanty. He lived there before Rebbeck sold out and left. At the time I first knew of Rebbeck upon this land (in the Perfete house) there was no house; when Conlan's shanty was afterwards built no one was living there. There was no house north of the Perfete house until you came to the city limits.

Defendant offered and filed in evidence certified copy of assessment roll for State and county taxes of Andrew Conlan for the fiscal year 1871 and '72, marked "Exhibit C," as follows:

COUNTY AUDITOR'S OFFICE.

I hereby certify the following to be a true and correct copy of the assessment of Andrew Conlan for the year 1871 and '72, as appears in the assessment roll for that year, now on file in my office.

No. 60.

Possessory claim of 40 acres of land on the northwest ¼ of sec. 30, township 2 south, range 13 west, south of Los Angeles City, in the county of Los Angeles, State of California, valued at $50; improvements, $250; 1 wagon, $40; 1 harness, $10; farm utensils, $20; 1 horse,
54 $25; 1 mare, $20; California mare, $10; 7 cows, $175; 5 stock cattle, $50; 2 hogs, $4; furniture, $10. Total value of real estate, $50; total value of improvements, $250; total value of personal property, $364. All property, $664.

State poll tax paid.

Conlan, Andrew, road poll tax, over age; amount of taxes, $18.26. Paid Nov. 11th, 1871.

Witness my hand and seal this 15th day of January, 1878.

[L. S.] A. E. SEPULVEDA,
County Auditor.

Defendant's Exhibit C. Filed January 15th, 1878.

It was admitted by counsel for plaintiff that defendant held the south

east 40 of the NW. ¼ of sec. 3, T. 2 S., range 13 W., S. B. M., by mesne conveyance from Edwards to Nelson, Nelson to Chapman, Chapman to Fogle, and Fogle to defendant, and the west ½ of said quarter by mesne conveyances from Rebbeck to Fogle, and from Fogle to defendant.

Whereupon defendant rested his case.

And be it further remembered that the plaintiff, to prove the issues on his part, offered and gave in evidence the following testimony, that is to say, read in evidence the testimony of E. Peppers and Fred.
55 Wetzel, taken upon a former trial of this cause, and reduced to writing by the court reporter, which is substantially as follows:

Testimony of E. PEPPERS, a witness sworn on the part of the plaintiff in a former trial of this case, and read as evidence upon the trial of this action. Witness Peppers testified substantially as follows:

Am particularly acquainted with the land in controversy; have been acquainted with it for twenty years. The time I heard of Mr. Conlan, the plaintiff, was in 1865; know the place called the Perfete place well; knew it for 22 years or more. I was then living on Los Angeles street; know when Mr. Conlan went into possession of that quarter section. I went down there in 1865 with horses and plow for Charles Owens. Owens had rented land from Edwards. I found Conlan there at that time. Rebbeck was living on Spring street. At the time I went down his two boys and daughter were living in one end of the Edwards house—it was called the six-mile house. Conlan put a shanty right by the Perfete house, and bought a piece of land from Jim Edwards, on the upper end of the road, on the left-hand side of the road going down; would work a day for Edwards and use his (Edwards') team to plow.
I went there on the 10th of March; stayed a month and three
56 days. Mr. Rebbeck and his family were still living with Mr. Eewards, and Conlan had his house up and was living in it.

On cross-examination the witness, Pepper, testified substantially as follows:

I was working for Charles Owens; have spent sixty days in the county jail. The rains were over when I saw Mr. Rebbeck there; there was no rain after that. Cannot tell how much land Conlan farmed that year; think he bought fifty acres from Edwards. That was the land I knew of Conlan's having. Could not say the land Conlan bought of Edwards is included in this controversy. I merely saw what he bought there. I knew of Conlan claiming no land outside of that fifty acres. I know that was all the land he had there at that time; it was all fenced in; he planted the whole of it in corn. The first I saw of him was on the 10th day of March. I did not know whether he had been there before or not; he was a stranger to me. I have means to keep the dates of almost anything. I keep a day-book; am a very good clerk; keep dates in my head.

Question by the court. Did you keep a book?

Answer. You go down and ask J. H. Jones if didn't keep books.

Question by the court. Did you make an entry in a book?
57 Answer. No, sir; never made an entry in any book in the world; made an entry in my memory. Ain't my memory book? What do I make a book of but memory? I made the entries in my head; that is where you find them all.

Question. How do you know that it was the 10th of March, that is what I ask?

Answer. That is out of reason, that question is; that is to a man

mighty poor head that cannot tell the 1st, or 2nd, or 3rd of the month; can read the dates of the month, can write them if I am pushed.

Question. Well, why not write them?

Answer. I have done some very big business from here to Arizona with others, and I always kept the dates, and do it correct. I can prove that I went there. On the 10th day of March Clark Owens and I went there together; that is enough. I stayed there a month and three days. We had a horse race on Sunday and left on Monday; it was near the last of April. I stayed there about three days after I quit work. I know when March comes, and fooling around nine days I know when the 10th comes.

FRED WETZEL testified substantially as follows:

I live on section twenty-four; know the plaintiff Conlan; have known him ever since the time he went to live upon sec. 30. I lived on
58 the place two months before I moved. I moved to my place; at that time Rebbeck lived at the Edwards place. Price had a horse race there, and they invited me there, and I saw Rebbeck's family in Edwards' house. Conlan had his house already up at that time. It was in February, 1865, when he built his house. At that time there was no one living in the Perfete house. I saw the house and it was empty.

On cross-examination witness testified substantially as follows:

It was in January when I passed there. I don't recollect the day; it was just after New Year.

ANDREW CONLAN, plaintiff, sworn and examined on his own behalf, testified substantially as follows:

Am the plaintiff in this action; entered upon the land in controversy on the 4th day of Febuary, 1865, with intent to pre-empt the same when it became government land subject to pre-emption. There was no one in possession of the land when I went on it. I purchased it in February, 1865. When I took possession the Rebbecks were living in the Edwards house. There was no person living in the Perfete house when I went on the land. The forty acres I bought was claimed by Edwards and Nelson. I bought of Edwards; told defendant Quinby, in presence of his son, L. F. Quinby, that I claimed the whole
59 quarter section. The forty acres were measured off to me with a rope. I built a fence between myself and Nelson. It was the division line between myself and Nelson; Nelson furnished the timber. I notified Fogle when he purchased of Rebbeck that I claimed the whole quarter section.

On cross-examination witness testified substantially as follows:

I never had possession of any part of the land in controversy except by my cows grazing upon it. I did not herd my cattle; I looked after them from the house, and generally kept them in *site*; never cultivated any land except on the forty acres I bought of Edwards. Never cultivated, improved, or had possession of any part of the 120 acres of land in controversy. The division line between Nelson and myself marked by the fence was the division between the forty purchased by me of Edwards and one of the forties included in the 120 acres in controversy, now occupied and cultivated by Quinby.

Mrs. LOUISA ROSE called, sworn, and examined on the part of the plaintiff:

Know plaintiff and defendant; have known plaintiff since the early part of 1865; defendant a little longer; know the six-mile house;
60 lived there in 1865; was then the wife of Jim Edwards, my then husband; sold Conlan some land; think it was in February, 1865; Conlan built a house on it and moved into it; know the Perfete house; it is north of the six-mile house. The house Conlan built was north of the Perfete house; at the time Conlan built his house Rebbeck and his family were living in the six-mile house; they moved into the Perfete house sometime after; Conlan was living in the house he built on the land he bought of Edwards; know Conlan bought the land in the spring, because he was frequently at the house.

On cross-examination witness testified that Conlan went on to the land about three months; he bought it of her husband.

WILLIAM PRICE, a witness sworn and examined on the part of the plaintiff, testified substantially as follows:

Know plaintiff and defendant; know the land in controversy; have known it ten or twelve years; know the six-mile house; know the Perfete house; know B. Rebbeck and his family; they lived at the six-mile house, in part of the house occupied by James Edwards when Conlan built and moved into the house on the land; at that time there was no person living in the Perfete house; cannot tell what time Conlan
61 took possession of the land; it was before April, 1865; this I know, because in April, 1865, I had a horse race at the Edwards place, and saw the Perfete house empty and the Rebecks living at the Edwards house; and Conlan had been living at the house on the land for some time before that.

Cross-examined:

The horse race was the only thing I could fix the date from.

ALFRED JAMES, called on part of plaintiff, testified substantially as follows:

Quinby filed his declaratory statement in my office November 23rd, 1871, alleging settlement March 4th, 1869. Conlan filed his declaratory statement May 25th, 1868, alleging settlement February 5th, 1865. Township 2 south, range 13 West, San Bernardino meredian, was surveyed in the field February 22nd, 1868, and filed in the office April 22nd, 1868; it was approved two or three days before filing. There was a controversy in my office between the plaintiff and defendant in this action as to their rights to pre-empt this land, in which plaintiff and defendant appeared and introduced testimony. (Shown paper.) This a copy of a decision of the Secretary of the Interior, rendered in the case of Conlan against Quinby, involving the west ½ of the N. W. ¼ and the southeast ¼ of the N. W. ¼ of sec. 30, township 2 south, range 13
62 west, and is a record of my office. On that hearing the land was awarded to Conlan. At the hearing referred the Commissioner of the General Land Office decided in favor of Quinby.

GEORGE HANSEN, called, sworn, and examined on the part of the plaintiff, testified substantially as follows:

Am a surveyor by profession; was deputy United States surveyor in February, 1868. Surveyed township 2 S., R. 13 W., S. B. M., which in-

cludes the land in controversy, in February, 1863, under the instructions of the surveyor-general of the United States for California. Exhibits A and B is the original letter and instructions of the surveyor-General.

Plaintiff offers Exhibits A and B in evidence, copies of which are annexed hereto, marked Exhibits A and *er*spectively.

Plaintiff rests.

And defendant offered and gave the following testimony in rebuttal:

B. REBBECK testified substantially as follows:

Heard the testimony of William Price. The horse-race Price spoke of was, I think, in the first part of March. Mr. Conlan was, I think, living in the house at that time, but about my not living in the (Perfete) house at that time Mr. Price must know better, because I em-
63 ployed him in February to put the stock I had there in the corral, while I went to San Bernardino for more stock, and he charged me for nine and a half days' work. I had a corral on the Edwards place, and on the day of the horse-race I took it away and made an addition to the corral I had built on my place before that; that is what I was doing with a corral at Edwards' that day.

ALEXANDER NELSON, recalled in rebuttal, testified substantially as follows:

There was a division line between Conlan and myself before I bought the land from Edwards. Conlan had the line run with a rope; when I purchased from Edwards I got Hadley with the consent of Conlan to survey the line between us, and Hadley run the line with his compass and chain, and upon that line the fence was made. Conlan was satisfied with the line and so was I. The fence belonged one-half to him and one-half to me, and was the division line.

L. F. QUINBY, called, sworn, and examined on the part of the defendant in rebuttal, testified substantially as follows:

Heard the testimony of plaintiff, Conlan; there was no conversation between Conlan and my father in my presence before father purchased the land. We fenced the land in 1871 or '2; before that ran upon it all the time the stock of Conlan as well as others and our own; Con-
64 lan kept no herder with his stock at that time; they roamed over the neighbors' land as well as ours; sometimes they were on the land in controversy, and sometimes upon other land; the conversation between Conlan and my father was after we moved on the land; I never saw Conlan before; I was living with my father all the time.

Whereupon the jury was charged by the court, and argument by counsel the said cause was submitted to the jury, which rendered its findings and verdict upon the special issues submitted to it.

Assignment of errors.

Counsel for defendant assigns as errors the following, viz:

1st. The court erred in rendering judgment in favor of plaintiff and against defendant upon the finding of the jury, because said judgment is against the said findings and against law.

2nd. The court erred in finding separate and additional findings from those found by the jury, for the reason that the said findings are not supported by the evidence in said action, and are against law.

65 3rd. The court erred in rendering judgment in favor of said plaintiff and against said defendant. Because:

1st "A." Finding three of the jury is against the evidence.

2d. Finding seven of the jury is against the evidence.

3d. Finding 11 is contrary to the evidence and immaterial in this, that it assumes to pass on a question of law.

4th. Finding thirteen is against the evidence in this, that it appears by the testimony of Hadley, Nelson, Widney, and others, that plaintiff only claimed 40 acres of land at the date of settlement of defendant, and because in said finding the jury attempted to and did pass upon a question of law.

4th. The court erred in finding three of its findings, because said finding is contrary to the evidence in this, that it appears by the evidence on the trial of said cause that plaintiff, Conlan, did not enter upon the N. W. ¼ of sec. 30, T. 2 S., R 13 W., S. B. M., which includes the land in controversy, in February, 1865, with intent to pre-empt the same, but that he claimed 40 acres of land and no more; and because the evidence shows that long after his filing of his said declaratory
66 statement he only claimed. cultivated, and possessed 40 acres of land, no part of which is involved in this action.

5th. The court erred in finding fourth, because the same is contrary to the evidence in this, that the evidence shows that Rebbeck entered into the possession of the west 80 acres of land in controversy before February, 1865.

6th. The court erred in finding five, because the same is contrary to the evidence in this, that it appears from the testimony that the officers of the United States Land Office were misled by the testimony given and produced by the plaintiff before them on the hearing between plaintiff and defendant in the said office, and that no bona fide settlement was ever made by plaintiff on the whole of said quarter section, or that he ever at any time made any settlement upon any portion of the land in controversy, or ever held or possessed the same or any part thereof.

7th. The court erred in finding six, because the same is contrary to evidence in this, the evidence shows that the survey of the rancho Sausal Redondo was not finally confirmed until after the filing of the declaratory statement of plaintiff.

8th. The court erred in finding seventh, because the same is contrary to the evidence in this, that it appears by the testimony that
67 until long after the filing of the declaratory statement of defendant the plaintiff held himself out to defendant and the whole world as claiming only forty acres of land.

9th. The court erred in its finding eighth, because the same is not supported by the evidence.

10th. The court erred in its conclusions of law, and in ordering judgment entered thereon in favor of the plaintiff and against , for the reason that the same are contrary to the evidence and against the law.

A. J. KING.
Attorney for Defendant.

JOHN R. MCCONNELL,
Of Counsel.

Received copy of above this 5th day of April, 1878, and the said statement is hereby objected to on the grounds that the same was not served within forty days after the service of the notice of intention to move for a new trial in this cause, the plaintiff herein not having in any manner

consented to any extention of time for serving the same. I therefore refuse to prepare any amendment to said statement.

JOHN D. BICKNELL,
Attorney for Plaintiff.

68 I certify that the foregoing is hereby allowed.
April 22d, 1878.

SEPULVEDA, *Judge.*

Statement. Filed April 4th, 1878.

Ruling on motion for new trial.

[Title of court and cause.]

MONDAY, *April 22d*, 1878.

Motion denied. Defendant excepts.

A full, true, and correct copy of the original ruling on motion for a new trial, as appears on the minutes of the said district court.

A. W. POTTS, *Clerk,*
By GRIFFIN JOHNSTON,
Deputy Clerk.

Findings

[Title of court and cause.]

In this action the issues arising upon the defendant's equitable cross-complaint and plaintiff's reply thereto were heretofore tried. A jury was selected and sworn to try special issues framed by counsel and approved by the court, and duly rendered their verdict thereon, and thereupon the jury was discharged, the case reserved for further
69 consideration, and, after argument by counsel, was duly submitted to the court and taken under advisement.

And now after due consideration of the facts and the law, I find the facts to be as follows:

I. The special verdict rendered by the jury and now on file in this case is approved, and is hereby referred to and made a part of this finding of facts. The said special verdict hereby incorporated herein is filed January 16th, 1878.

II. Township 2 south, range 13 west, S. B. M., which includes the lands in controversy, was duly surveyed by the United States authorities in the month of February, A. D. 1868, and said township plat was duly filed in the United States Land Office April 22d, 1868; was suspended May 26th, 1868; released from suspension Nov. 21st, 1871; again suspended March 18th, 1872, and finally restored June 11th, 1872.

III. The plaintiff, Andrew Conlan, entered upon the N. W. ¼ of sec. 30, T. S., R. 13 W., S. B. M., which includes the land in controversy, in February, 1865, while the same was unsurveyed government, land with the intention of pre-empting the same, and within three months
70 after the filing of the said township plat in the U. S. Land Office, to wit, on the 25th day of May, 1868, duly filed his declaratory statement in form as required by law, claiming as a pre-emptor said N. W. ¼ of sec. 30.

IV. The S. E. ¼ of said quarter section was in 1865 and anterior thereto claimed by one Edwards, as part owner in the Sausal Redondo

grant, as a part of said grant. In the same year Edwards conveyed it with other lands similarly held by him, for a valuable consideration, to one Nelson, who sold and conveyed to Fogle, and Fogle, after remaining some time in the actual possession and occupation thereof, in 1869, sold and conveyed to defendant, Quinby. Both Fogle and Quinby paid actual money consideration upon their respective purchasers.

As early as 1863, one Perfete occupied the W. ½ of the said N. W. ¼ of sec. 30, and had there a dwelling house and some slight improvements. He transferred his improvements to Rebbeck, who afterwards conveyed to Fogle, from whom the defendant purchased in 1869. Rebbeck enclosed the same after February, 1865, and since then he and Quinby, his successor, have cultivated and used the same. And the de-
71 fendant, Hiram Quinby, after his said purchase entered upon the land in controversy in this action in the year 1869, with intention of pre-empting the same, and filing his declaratory statement in the United States Land Office, in due form of law, on the 23d of November, 1871.

V. Subsequent to the last named date a hearing was had before the officers of the United States Land Department, between plaintiff and defendant as to their rights respectively to pre empt the lands in controversy in this action, and both parties appeared and introduced evidence therein, and upon said hearing the land was awarded to the plaintiff by said land department, and subsequently thereto and before the commencement of this action a patent was issued to said plaintiff for the northwest quarter of said section 30 by the United States Government. Upon said hearing the plaintiff did not give any false or fraudulent evidence, or make or cause to be made any false or fraudulent statements to the officers of said land office, and upon said hearing there was not given any false evidence that misled or in any manner deceived said officers as to the fact of plaintiff's settlement on said land or as to any other facts in controversy between plaintiff and defendant upon said hearing. And none of the officers of the
72 United States Land Department were in any manner deceived or misled as to any fact in controversy, nor were they induced by any false or fraudulent evidence to award the land to plaintiff.

VI. The rancho Sausal Redondo, a Mexican grant, was surveyed by the United States authorities in January or February, A. D. 1868, under and according to the provisions of the 8th section of the act of Congress entitled "An act to quiet land titles in California," approved July 23d, 1866, which said survey was finally approved and a patent for said rancho was issued upon said survey, and the land in controversy was not included in said rancho by said survey, and formed no part thereof, and was at the date of the filing of the declaratory statement by plaintiff, Conlan, public land and subject to pre-emption.

VII. Reference being here had to the 10th of the 2nd series of special issues submitted, and the verdict of the jury thereon, I find, in addition, that the defendant was not, by any such statements or representations, misled into purchasing said lands, nor to move upon the same, nor to claim the same as a pre-emptor, nor was he induced to delay his filing, or waive or neglect any right. His damage consisted solely
73 in his being led into a hopeless contest for the land.

VIII. As to any and all other issues and allegations contained in defendant's equitable cross-complaint, they are wholly unsupported by proof, and I find them, all and singular, untrue, and, as conclusions of law, I hold:

That plaintiff is entitled to judgment; that defendant take nothing

by his cross-complaint, and that the same be dismissed with costs upon this branch of the case.

Let judgment be entered accordingly.

S. C. DENSON,
District Judge, Presiding.

Filed January 31st, 1878.

Verdict.

[Title of court and cause.]

We, the jurors impanelled to try the above entitled action, or case, having agreed in a verdict hereby annexed.

Los Angeles, January 16th, 1878.

JOHN TAYLOR,
Foreman.

Special issues submitted to the jury upon cross-complaint of defendant and reply of plaintiff.

[Title of court and cause.]

74 The court submits the following interrogatives to the jury upon the cross-complaint of defendant and reply of plaintiff:

I. When was township 2 S., R. 13 W., S. B. M., which township includes the land in controversy, surveyed by the United States authorities?

Answer. February 22nd, 1868.

II. When was the township plat of said township filed in the United States Land Office?

Answer. April 22nd. 1868.

III. When did the plaintiff, Conlan, enter upon the N. W. ¼ of sec. 30, T. 2 S., R. 13 W., which includes the land in controversy, claiming the same as a pre-emptor.

Answer. February 4th, 1865.

IV. When did the plaintiff, Conlan, file his declaratory statement in the United States Land Office claiming the land in controversy?

Answer. May 25th, 1868.

75 V. At the date of Conlan's entry upon said lands, was any other person in possession of any part of the land in controversy in this action; if so, who was in such possession?

Answer. Rebbeck was in possession of the west ½ of the N. W. ¼, and Edwards of the southeast forty.

VI. When did the defendant, Quinby, enter upon the lands in controversy, claiming the same as a pre-emptor?

Answer. In 1869.

VII. When did the defendant, Quinby, file his declaratory statement in the United States Land Office, claiming the lands in controversy as a pre-emptor?

Answer. November 23rd, 1871.

Filed.

Special issues.

[Title of court and cause.]

(1.) At the time of the filing of the plaintiff's declaratory statement

on the 25th day of May, 1868, was the land in dispute claimed to be within the limits of the Sausal Redondo rancho?

Answer. Yes.

(2.) Was such Sausal Rodondo rancho a valid Mexican grant?

76 Answer. Yes, as approved by the U. S. survey.

(3.) At what time was the township plat of township 2 south, range 13 west, finally and definitely filed?

Answer. April 22d, 1868.

(4.) When plaintiff first entered upon the N. E. ¼ of the N. W. quarter of sec. 30, who, if any one, was in possession of the west half and southeast forty of said quarter?

Answer. Rebbeck was in possession of the west ½ of said quarter, and Edwards of the southeast forty.

(5.) For how long a period did defendant and those from whom he purchased occupy the west half and the southwest quarter of the northwest quarter of section 30?

Answer. From 1865 to the present time.

(6.) Were each of the predecessors of defendant in the possession of the land in dispute qualified pre-emptors?

Answer. Yes.

(7.) Did each of them settle upon and improve the land in dispute with the intention to pre-empt the same?

Answer. No.

(8.) At what time did defendant file his declaratory statement?

Answer. November 23, 1871.

77 (9.) Did plaintiff ever actually occupy or improve the west and the south W. quarter of the N. W. quarter of section 30?

Answer. No.

(10.) Did plaintiff ever make any statements or representations to the effect that he did not intend to claim the land in dispute, and thereby mislead and deceive the defendant to his (defendant's) injury?

Answer. Yes.

(11.) Did plaintiff give any false or fraudulent evidence before the officers of the land office, by means whereof said officers were misled as to the fact of plaintiff's settlement on the disputed land, and as to his intentions to pre empt the same?

Answer. No.

(12.) Was defendant misled or deceived by any statements made by plaintiff, and induced thereby to defer the filing of his declaratory statement until the final determination of the boundaries of the Sausal Redondo grant?

Answer. Yes.

(13.) Did plaintiff practice any fraud or imposition, or give any false evidence as to the date of his settlement, by means whereof he induced the officer of the land office to award the land in dispute to him?

Answer. No.

78 (11½.) If the jury find, in answer to the 11th issue, that the plaintiff gave any false and fraudulent evidence before the officers of the United States Land Department, they will then answer this issue. In what particular was such evidence false and fraudulent?

Answer.

Filed January 16th, 1877.

Judgment.

[Title of court and cause.]

This cause having been heretofore tried and submitted to the court

upon the cross-complaint of defendant and plaintiff's answer thereto, and upon the evidence adduced by the respective parties, and the special verdict found by the jury herein; and the said cause, after argument by counsel, having been taken under advisement by the court, and the judge having this day made and filed his findings of fact and conclusions of law, ordering judgment to be entered in favor of plaintiff upon said cross action—

It is therefore ordered, adjudged, and decreed by the court here that the defendant, Hiram Quinby, take nothing by his said cross action; and his cross-complaint is hereby dismissed and the prayer thereof denied. And it is further ordered, adjudged, and decreed that the
79 plaintiff, Andrew Conlan, do have and recover of and from the defendant, Hiram Quinby, the costs of the trial of this branch of the above-entitled cause, by said plaintiff expended, taxed at $137.20.

S. C. DENSON,
District Judge.

Filed January 31st, 1878.

Findings of fact and conclusions on issues of complaint and answer.

[Title of court and cause.]

All the issues made by the cross-complaint and reply thereto herein having been tried and fully determined, and judgment entered in favor of the plaintiff and against the defendant, to which judgment reference is hereby made and the same made a part hereof, now on the issues made by the complaint, and answer thereto, the court finds the following facts from the evidence introduced:

First. That the plaintiff, Andrew Conlan, was on the 10th day of April, 1875, at the time of the alleged entry of defendant, and at the time of the filing of the complaint herein, and is now the owner and seized in fee and entitled to the possession of the W. ½ of the N.
80 W. ¼ and S. E. ¼ N. W. ¼ of sec. 30, T. 2 S., R. 13 W., S. B. M., the lands described in the complaint herein.

Second. That there was not at the time of the commencement of this action, and has not been since that time, and is not now pending in this or any other court any action whatever between the parties hereto wherein the issues made in this cause will or can be tried.

Third. That the defendant was at the date of entry as alleged in the complaint, to wit, the 10th day of April, 1875, and has been ever since that time and is now, in possession of said premises described in the complaint.

Fourth. That the yearly value of the rents and profits of said lands is $240.00 gold coin, and the value of the rents and profits of said premises since the 10th day of April, 1875, to the present time is $680.00 gold coin.

Fifth. That the plaintiff is entitled to the immediate possession of said premises, and the defendant has no interest or estate therein.

CONCLUSION.

The plaintiff is entitled to recover from the defendant the possession of the lands described in the complaint, and $680.00 gold coin as rents and profits thereof, and his costs. Let judgment be entered.

SEPULVEDA, *Judge.*

Filed February 13th, 1878.

81 *Judgment.*

[Title of court and cause.]

The issues made by the cross-complaint of the defendant, and reply thereto by plaintiff, having been heretofore tried in this court, and findings of fact filed, and judgment thereon entered against the defendant and in favor of the plaintiff, upon all the facts alleged and issues made by the cross-complaint herein filed, and equitable defense made by defendant herein, and this cause coming on regularly for trial on the 11th day of February, A. D. 1878, John D. Bicknell appearing for plaintiff and A. J. King and J. R. McConnell for the defendant, a trial by jury having been expressly waived by the respective parties, the cause was tried before the court sitting without a jury, whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined, and the evidence being closed, the case was submitted to the court for consideration and decision, and after due deliberation thereon the court, upon the findings heretofore made and judgment entered in this cause upon the cross-complaint of defendant, and reply thereto by plaintiff, and upon the findings herewith filed, orders that judgment be entered herein that the plaintiff recover the possession of said premises, and the sum of $680 in gold coin for rents and profits, and costs of suit.

82 Wherefore, by reason of the law and the judgment and findings aforesaid, it is ordered, adjudged, and decreed, that the plaintiff, Andrew Conlan, do have and recover of the defendant, Hiram Quinby, the possession of the W. ½ of the N. W. ¼ and S. E. ¼ of N. W. ¼ of sec. (30) thirty, township No. (2) two south, range No. (13) thirteen west, S. B. M.; and it is further ordered, adjudged, and decreed, that the plaintiff do have and recover of the defendant the sum of $680 in gold coin, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $103.80 gold coin, upon the trial of the issues of law, and the further sum of $119.95 gold coin, costs incurred in ther trial of the equity issues of this cause.

Judgment rendered Feb'y 13th, 1878.

SEPULVEDA, *Judge.*

Filed February 13th, 1878.

Notice of appeal.

[Title of court and cause.]

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this State from the judgment therein made and entered in the said district court, on the day of , A. D. 1878, in favor of the plaintiff in said action and

83 against said defendant, and from favor of the whole thereof, and also from the order of the said district court made and entered on the 22d day of April, A. D. 1878, overruling and denying defendant's motion for a new trial of the issues in said action.

Dated this day of April, A. D. 1878.

Yours, &c.

A. J. KING & J. R. McCONNELL,
Attorneys for Defendant.

To the clerk of said district court, and John D. Bicknell, esq., attorney for plaintiff.

Filed April 30th, 1878.

Service of copy received after filing this 30th day of April, A. D. 1878.

JOHN D. BICKNELL.

Clerk's certificate.

[Title of court and cause.]

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, A. W. Potts, county clerk and ex-officio clerk of the district court of the 17th judicial district of the State of California, in and for the county of Los Angeles, do hereby certify that the foregoing transcript contains full, true and correct copies of the following described documents on file in my office in the above entitled action: Answer,
84 answer to cross-complaint, complaint, cross-complaint, findings of court, findings of fact, and conclusions on issues of complaint and answer, judgment, judgment, ruling on motion for a new trial, special issues, special issues submitted to the jury on cross-complaint and verdict; and I do hereby further certify that a good and sufficient undertakings on appeal has been filed herein, properly conditioned, within the time required by law.

Witness my hand and the seal of said district court this 10th day of May, 1878.

A. W. POTTS, *Clerk,*
By GRIFFIN JOHNSON,
Deputy Clerk.

85 *Addenda.*

(The following documents are to be taken as a part of and read in connection with the foregoing transcript, according to the chronological order thereof.)

In the district court of the seventeenth judicial district, State of California, in and for the county of Los Angeles.

ANDREW CONLAN, PLAINTIFF,
vs.
HIRAM QUINBY, DEFENDANT.

Order extending time.

Ten days' further time is hereby given defendants in which to prepare, serve and file statement on motion for a new trial in the above-entitled action, good cause being shown to me therefor.
February 23d, 1878.

GEO. C. GIBBS,
Court Commissioner, Los Angeles County.

Filed Feb'y 23rd, 1878.

[Title of court and cause.]

Order extending time.

86 Good cause having been shown to me therefor, ten days' further time is hereby given defendant in which to prepare, file and serve statement on motion for new trial in the above-entitled action
February 25th, 1878.

SEPULVEDA, *Judge.*

Filed February 25th, 1878.

[Title of court and cause.]

Order extending time.

Good cause being shown therefor, ten days' further time is hereby given defendant in which to prepare, serve, and file statement on motion for new trial in the above-entitled action.

March 6th, 1878.

SEPULVEDA, *Judge.*

Filed March 6th, 1878.

[Title of court and cause.]

Order extending time.

Good cause having been shown therefor, ten days' further time is hereby given defendant in which to prepare, file, and serve statement on motion for new trial in the above-entitled action.

March 15th, 1878.

SEPULVEDA, *Judge.*

Filed March 15th, 1878.

87 [Title of court and cause.]

Order extending time in which to prepare, serve, and file statement on motion for new trial.

Good cause having been shown to me therefor, ten days' further time is hereby given defendant in which to prepare, serve, and file statement on motion for new trial in the above-entitled action.

March 25th, 1878.

SEPULVEDA, *Judge.*

Filed March 25th, 1878.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Clerk's certificate, addenda.

I, A. W. Potts, county clerk and ex-officio clerk of the district court of the 17th judicial district of the State of California, in and for the county of Los Angeles, do hereby certify that the foregoing addenda to transcript contains a full, true, and correct copy of each of the several orders made and filed in the above-entitled action, extending the
88 time within which to prepare, serve, and file defendant's statement on motion for a new trial herein.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 10th day of June, A. D. 1878.

[SEAL.] A. W. POTTS, *Clerk,*
By GRIFFIN JOHNSON,
Deputy Clerk.

89 I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the transcript on appeal in the above-entitled cause, filed in my office on the 17th day of June, 1878, as shown by the records of my office.

Witness my hand and the seal of the court this 7th day of January, A. D. 1879.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH,
Deputy Clerk.

Service by copy this 15th day of June, 1878.

JOHN D. BICKNELL,
Attorney for Respondent.

90 In the supreme court of the State of California, October term, A. D. 1878.

ANDREW CONLAN, PLAINTIFF & RESPONDENT,
vs.
HIRAM QUINBY, DEFENDANT & APPELLANT. } No. 6116.

On appeal from the district court of the 17th judicial district, in and for the county of Los Angeles.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court from the bench.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order denying a new trial of the district court of the 17th judicial district, in and for the county of Los Angeles, in the above-entitled cause, be and the same is hereby affirmed with costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment, entered in the above-entitled cause, on the 31st day of October, A. D. 1878, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 7th day of January, A. D. 1879.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

91 In the supreme court of the State of California.

ANDREW CONLAN, DEFENDANT IN ERROR,
vs.
HIRAM QUINBY, PLAINTIFF IN ERROR. } No. 6116.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing documents and papers are and constitute a true copy and transcript of the record and of all the proceedings in the above-entitled cause as the same appears upon the records and files of said court in my office.

And I do further certify that on the 6th day of January, 1879, the said plaintiff in error filed in this court a writ of error (herewith transmitted) duly allowed by the Hon. Wm. T. Wallace, chief justice of this court, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of said writ of error for the defendant in error, and also on said 6th day of January, 1879, filed in my office a cita-

tion (herewith transmitted) purporting to have been served upon the attorney for the defendant in error, also a bond in the sum of one thousand five hundred dollars (a copy of which is hereto annexed), with sureties approved by Hon. Y. Sepulveda, judge of the district court of the 17th judicial district, and Hon. Wm T. Wallace, chief justice
92 of this court, conditioned that said plaintiff in error shall prosecute his said writ to effect, and in case he fail to make his plea good to answer all costs, and also that said plaintiff in error has executed a bond in the sum of two hundred dollars (herewith transmitted) for costs of clerk of the Supreme Court of the United States.

Witness my hand and the seal of the court this 7th day of January, A. D. 1879.

[SEAL.] D. B. WOOLF, *Clerk*,
By H. P. BUSH,
Deputy Clerk.

93 UNITED STATES OF AMERICA,
State of California, ss:

ANDREW CONLIN, PLAINTIFF,
vs.
HIRAM QUINBY, DEFENDANT.

The President of the United States to the hon. judges of the supreme court of the State of California, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Andrew Conlin, plaintiff, and Hiram Quinby, defendant, wherein was drawn in question the construction of the pre-emption laws of the United
94 States, under which said defendant claims, and the decision of said court was against the right and title specially set up and relied on by said defendant under said pre-emption laws, manifest error hath intervened to the great injury of said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that
95 the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable W. T. Wallace, chief justice of the said supreme court.

WM. T. WALLACE,
Chief Justice.

(Indorsed:) In the Supreme Court of the United States of America. 6116. Andrew Conlin, plaintiff, vs. Hiram Quinby, defendant. Writ of error. Filed January 6, 1879. D. B. Woolf, clerk, by H. H. Bush, deputy.

96 UNITED STATES OF AMERICA,
State of California:

ANDREW CONLIN, PLAINTIFF,
vs.
HIRAM QUINBY, DEFENDANT.

The United States of America to Andrew Conlin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Hiram Quinby is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

97 Witness the honorable Wm. T. Wallace, chief justice of the supreme court of the State of California, this day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

WM. T. WALLACE,
Chief Justice.

(Indorsed:) In the Supreme Court of the United States of America. 6116. Andrew Conlin, plaintiff, vs. Hiram Quinby, defendant. Citation.

Service of copy of within admitted this 3rd day of January, 1879.
JOHN D. BICKNELL,
Att'y for Pl'ff.

Filed January 6, 1879. D. B. Woolf, clerk, by H. P. Bush, deputy.

98 In the supreme court of the State of California.

ANDREW CONLAN, DEFENDANT IN ERROR,
vs.
HIRAM QUINBY, PLAINTIFF IN ERROR.

Know all men by these presents that we, Hiram Quinby, L. F. Quinby, and Salisbury Haley, are held and firmly bound unto Andrew Conlan in the full and just sum of one thousand five hundred dollars, to be paid to the said Andrew Conlan, his certain attorney, executor, administrators, or assigns, to which payment well, truly to be made, we bind ourselves, or heir, executors, administrators, jointly and severally by these presents, sealed with our seals and dated this 9th day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately at a term of said court, in a suit depending in said court between Andrew Conlan and Hiram Quinby, judgment was rendered against the said Hiram Quinby, and the said Hiram Quin-
99 by having obtained a writ of error to the supreme court of the State of Cal, and filed a copy thereof in the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Andrew Conlan, citing and admonishing him to be

and appear at the Supreme Court of the United States, to be holden at Washington the 2d Monday in October next:

Now, the condition of the above obligation is such that if the said Hiram Quinby shall prosecute his suit to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HIRAM QUINBY. [SEAL.]
L. F. QUINBY. [SEAL.]
SALISBURY HALEY. [SEAL.]

Sealed and delivered in the presence of—
CHAS. E. JUDD.

Approved by me this 13th day of December, 1878.

Y. SEPULVEDA,
Dist. Judge.

Attest:

A. W. POTTS,
Clk 17th Dist. Court.

100 STATE OF CALIFORNIA,
County of Los Angeles, ss:

L. F. Quinby and S. Haley, whose names are subscribed as sureties to the within bond, being severally duly sworn, each for himself, deposes and says that he is a resident and freeholder and householder within said county; that he is worth the amount for which he becomes surety on said bond, over and above all debts and liabilities, in unencumbered property situated within this State, exclusive of property exempt from execution and forced sale.

L. F. QUINBY.
SALESBURY HALEY.

Subscribed and sworn to before me this 9th day of December, 1878.
[SEAL.] A. W. POTTS,
County Clerk.

(Endorsed:) Bond of Hiram Quinby.

I approve the within bond. Witness my hand this 20th day of Dec. 1878.

WALLACE, *C. J.*

Filed January 6th, 1879. D. B. Woolf, clerk, by H. P. Bush, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the bond filed in my office in the above entitled cause on the 6th day of January, 1879, as shown by the records of my office.

Witness my hand and the seal of the court this 7th day of January, A. D. 1879.
[SEAL.]

D. B. Woolf, *Clerk,*
By H. P. BUSH, *Deputy.*

(Indorsement on cover:) No. 163. Hiram Quinby, plaintiff in error, vs. Andrew Conlan. California sup. court. Filed 24th February, 1879.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

No. 163.

HIRAM QUINBY, PLAINTIFF-IN-ERROR,

vs.

ANDREW CONLAN.

BRIEF FOR HIRAM QUINBY.

STATEMENT OF THE CASE.

This was originally an action commenced in the District Court of Los Angeles County, California, by Andrew Conlan against Hiram Quinby, to recover possession of the west half of the Northwest quarter, and the Southeast quarter of the Northwest quarter of Section 30, Township 2 South, Range 13 West, in sai.[1] County and State; and damages for the detention of the same by said Quinby.

Conlan, in his complaint, (Record, page 1,) alleged seizure of said premises in fee, right of possession in himself; ouster, actual possession and an unlawful detention of the same by Quinby to his (Conlan's) damage in the sum of one thousand dollars.

Quinby in answer (Record, pages 2–6) denied that Conlan was seized of said premises in fee, or that he was entitled to the possession of the same, or that he had been ousted therefrom, as alleged, or that he had been damaged in the sum of one thousand dollars, or any other sum, whatever.

Quinby further answering, as an equitable defence to said action &c., averred that, prior and up to the 15th day of June, 1872, the lands in controversy were unsurveyed public lands of the United States; that he and certain persons to whom he had succeeded, and whose rights he had acquired, had settled upon the same, in good faith, in the year 1862, intending to pre-empt them, and had

from that time continuously occupied, improved, cultivated, resided upon and held the same adversely to the said Conlan, and that he Quinby still so occupied and held said land, having personally resided thereon with his family, and continuously cultivated and improved the same since the 4th day of March, 1869.

Quinby further answering averred that he was a citizen of the United States possessed of all the qualifications of a pre-emptor; and that after settling on said lands, as aforesaid, he, on the 23d day of November, 1871, filed his declaratory statement, alleging settlement as a pre-emptor, &c., in theland office at Los Angeles, California.

Quinby further answering averred that notwithstanding these facts and the further fact that Conlan had never, at any time, had possession of said lands, he (Conlan,) on the 25th day of May, 1868, while said lands were in the actual possession of one Fogle, from whom he (Quinby) had acquired the same, filed a declaratory statement in the land office, falsely and fraudulently, alleging a settlement upon said lands, on the 4th day of February, 1865, when in fact the only settlement thereon, before that time, was that made by Quinby's grantors.

Quinby further answering averred that said Conlan fraudently concealed his intentions to file for said lands, and thus led him and his grantors to believe that there was no claim to the same adverse to their own.

Quinby further answering averred that prior to 1871, it was claimed that said lands were a part of the Sausal Redondo rancho, a private Mexican land grant, and not a part of the public domain; and that for that reason, and the fact that the township plat was suspended, he was compelled to wait, and did not file his declaratory statement, until 1871, but that Conlan, for the purpose of defrauding him and his grantors, secretly filed a declaratory statement, at a time when it had not been determined that said lands were subject to pre-emption, &c.

Quinby further answering averred that notwithstanding these facts, the officers of the land department, upon a question of right between him and Conlan, mistook the law, and erroneously and wrongfully decided that Conlan had the better right; and thereafter issued to him a certificate of purchase and a patent for said lands.

Quinby further answering averred that in equity, &c., Conlan held the said patent and the legal title to said lands in trust for him and for his use and benefit and prayed judgment accordingly.

Conlan in reply (Record, pages 6–8) while not denying Quinby's averments as to his citizenship and qualifications as a pre-empter or the occupation of said lands by him and his grantors, after February 5, 1865, denied that the same were unsurveyed lands up to June, 1872; and that they were in 1862, or at any time, included within the boundaries of the Sausal Redondo rancho, or any other

Mexican grant. Conlan further replying, denied that he had been guilty of any fraud in fact or intention, or that the officers of the land department had mistaken or misconstrued the law in awarding said lands to him; and alleged the fact to be that said lands were duly surveyed in 1868; that the plat of the township in which the same are situated was duly filed in the land office, April 22, 1868; that he settled upon the Northwest quarter of section 30, township 2 South, Range 13 West, which includes the lands in controversy, on the 4th day of February, 1865, with the intention of pre-empting the same; that, at that time, no one was residing thereon; that of those who subsequently settled upon the same, Quinby alone claimed them as a pre-empter, and intended to acquire title thereto from the government; that he (Conlan) filed a declaratory statement for said lands May 25, 1868, alleging settlement as aforesaid; that afterwards in a contest between him and Quinby, the same were awarded to him (Conlan) and that he received a patent therefor from the government, &c.

On the trial of the case in the district Court, a jury was empanneled to try certain special issues upon the cross-complaint of Quinby and Conlan's reply thereto. On the testimony submitted the jury found (Record, pages 27 and 28) that the township embracing the lands in controversy was surveyed, February 22, 1868; that the plat thereof was filed in the land office, April 22, 1868; that Conlan entered upon the Northwest quarter of section 30, Township 2 South, Range 13 West, which includes the lands in controversy, claiming the same as a pre-emptor, February 4, 1865; that his entrance was upon the Northeast quarter or forty of said quarter section; that at the time he entered upon the same, one Rebbeck was in possession of the West half of said quarter section; and one Edwards of the Southeast forty thereof; that Conlan filed his declaratory statement claiming said quarter section May 25, 1868; that at that time the lands in dispute were claimed to be within the limits of the Sausal Redondo rancho, a valid Mexican grant; that Quinby and those from whom he purchased had occupied said lands from 1865; that each of Quinby's predecessors was a qualified pre-emptor, but that each did not settle upon and improve said land with the intention of pre-empting the same; that Quinby entered upon the lands in controversy, claiming the same as a pre-emptor, in 1869; that he filed his declaratory statement, claiming said lands, November 23, 1871; that Conlan never did actually occupy or improve the same; that he did make statements or representations to the effect that he did not intend to claim said lands, and that Quinby was thereby misled and deceived; that Conlan did not give any false or fraudulent evidence before the land officers, and that Quinby was misled or deceived by statements made by Conlan, and thereby induced to defer the filing of his declaratory statement until the

final determination of the boundaries of the Sausal Redondo grant, &c.

The court (Record, pp. 25, 26, and 27) approved and adopted these findings of the jury, and further found and held that the township plat, after having been filed in the Land Office April 22, 1868, was suspended May 26, 1868; that it was released from suspension November 21, 1871; suspended again March 18, 1872, and again, and finally released and restored to the files June 11, 1872; that the southeast quarter of the northwest quarter of section 30, township 2 south, range 13 west, was, in 1865 and anterior thereto, claimed by one Edwards as part of the Sausal Redondo grant; that in that year Edwards conveyed the same to one Nelson; that Nelson sold and conveyed the same to one Fogle; that Fogle, after remaining for some time in the actual possession and occupation of said tract, sold and conveyed the same to Quinby in 1869; that both Fogle and Quinby paid actual money consideration for said tract; that as early as 1863 one Prefete occupied the west half of said quarter section, and had thereon a dwelling house and other improvements; that he transferred his improvements to said Rebbeck; that Rebbeck conveyed them to said Fogle, from whom Quinby purchased them in 1869; that Rebbeck enclosed the same after February, 1865, and that since then he and his successor, Quinby, had cultivated and used the same; that Quinby, after his purchase in 1869, entered upon the lands in controversy with the intention of pre-empting the same; that he filed his declaratory statement, in due form of law, November 23, 1871; that afterwards there was a hearing between Conlan and Quinby as to their respective rights to pre-empt the lands in controversy; that the lands were awarded to Conlan by the officers of the land department, and that he received a patent therefor; that Conlan did not, at the hearing, submit any false or fraudulent evidence, &c.; that the rancho, Sausal Redondo, a Mexican grant, was surveyed in January or February, 1868; that the survey thereof was finally approved, and a patent issued thereon; that the lands in controversy were not included in said rancho by said survey and formed no part thereof, and were, at the date of the filing of Conlan's declaratory statement, public lands and subject to pre-emption; that Quinby was neither misled into purchasing said lands nor into moving upon the same, nor into claiming them as a pre-emptor, nor induced to delay his filing by any statements or representations of Conlan; that Conlan was entitled to judgment; that Quinby should take nothing by his cross complaint, and that the same should be dismissed; that Conlan was the owner of and entitled to the immediate possession of said lands and to recover the same, and that Quinby had no interest or estate therein. Judgment was rendered (Record, pages 29 and 30) accordingly, and awarding to Conlan said lands and the possession thereof, together

with damages and costs. Quinby thereupon moved for a new trial. His motion was overruled and denied, (Record, page 25,) and he appealed (Record, page 30) to the Supreme Court of the State. The said Supreme Court affirmed (Record, page 33) the judgment of the District Court without qualification or modification, and thereby approved and adopted its findings and conclusions in all things and made them its own. Quinby thereupon had the case removed, by writ of error, to the Supreme Court of the United States, where the same is now pending and undecided.

Assignment of Errors.

The Supreme Court of the State of California erred in approving and adopting the conclusions, findings, and holdings of the District Court to the effect:

First. That the lands in controversy were subject to pre-emption at the date of Conlan's filing, May 25, 1868.

Second. That Conlan was entitled to said lands or the possession thereof, and that he should recover the same.

Third. That Quinby had no interest or estate in said lands.

Fourth. That Conlan was entitled to judgment, and that Quinby should take nothing by his cross-complaint, and that the same should be dismissed.

Fifth. Said Supreme Court erred in affirming the judgment of the District Court, awarding said lands and the possession thereof to Conlan.

Argument.

The conclusion of the court below, that the lands in controversy were, at the date of Conlan's filing, subject to pre-emption, is in direct conflict with the facts established and found and contrary to law. The jury found (Record, pages 27 and 28) that at the date of Conlan's filing, May 25, 1868, the lands in controversy were claimed to be within the limits of the Sausal Redondo ranchio, a valid Mexican grant. The court adopted this finding and strengthened it by its fourth finding, (Record, pages 25 and 26,) and by its sixth finding, (Record, page 26.) The lands in controversy, therefore, could not have been subject to pre-emption at that date. The sixth section of the act of Congress, approved March 3, 1853, extending the pre-emption laws to lands in California, expressly and clearly excepts lands claimed under any foreign grant or title. 10 Statutes, 246.

Congress had previously, by the thirteenth section of the act, approved March 3, 1851, providing for the adjustment of private land claims in said State, declared that all lands not claimed, in

Conlan never, either before or after the lands in controversy became subject to pre-emption, made settlement upon, nor inhabited or improved the same, nor erected a dwelling house thereon, nor could he have acquired any right of pre-emption by doing so, at or after the time they became subject to pre-emption, for the reason that they were actually and continuously occupied by Quinby, who, as a qualified pre-emptor, claimed the same, This Court held in Atherton vs. Fowler, *supra*, and in Hosmer vs. Wallace, 97 United States, 580, that under the pre-emption laws "the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling house is to be exercised on vacant land," and that none of these things could be done on land when it was occupied and used by others. Nor could, nor did Conlan acquire any right to the lands in controversy by virtue of his settlement upon the northeast quarter of said quarter section, adjoining the said lands. In Hosmer vs. Wallace, 579, this Court held that "settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement, is in the possession and use of others, though by a subsequent survey by the government it prove to be part of the same sectional sub-division." In this case the lands in dispute were in the actual possession and use of others, at the date of Conlan's settlement upon the adjacent tract; and they have so remained ever since, including the date of the subsequent survey of the same, and the time when they became subject to pre-emption, being at this latter date actually occupied and used by Quinby himself. Conlan never performed any act that entitled him to claim said lands, under the pre-emption laws, or to enter the same, and receive a patent therefor. His entry allowed and made, without antecedent settlement upon the lands in controversy, and the improvement and cultivation of the same, and the filing of a declaratory statement, after they became subject to pre-emption, was unauthorized and void, and the patent issued upon the same is also void as against Quinby, whose settlement upon said land, in good faith, followed by continuous residence upon and the improvement, use, cultivation and possession of the same, and the filing of a declaratory statement in the time and manner prescribed by law, not only antedated said entry, but embraced the date of the release of said lands from reservation, and their restoration to pre-emption and the entire time subsequent thereto, embracing the date of said entry and the issuance of said patent, as appears by the findings of the jury and the Court hereinbefore referred to. It is true that these findings do not state the exact time when the final survey of the Sausal Redondo grant was approved and patent issued thereon, and the lands in controversy thereby

released from reservation and made subject to pre-emption, but they do show that this could not have been before the month of November, 1871. The Court and jury found that township 2, South, range 13 West, embracing the lands in controversy, as well as the Sausal Redondo grant, was surveyed February 22, 1868, and in connection with this the Court found that the said grant was surveyed in January or February, 1868, under and according to the provisions of the 8th Section of the act of July 23, 1866, entitled "an act to quiet land titles in California," 14 Statutes, 220, which provided for a survey of the township and the grant at the same time. The two surveys were, therefore necessarily simultaneous, and both were made February 22, 1868.

By the first section of the Act of July 1, 1864, 13 Statutes, 332, it was made the duty of the Surveyor General to give notice of the survey of the grant claim, after it was made, and to retain the same, with the plat thereof, in his office for ninety days from the date of the first publication of notice, subject to objections and protests; and to then transmit the same to the Commissioner of the general land office for his examination and approval. The approval of the commissioner was, therefore necessary to make the survey final. Considering the fact that, after the survey was made February 22, 1868, it had to be transmitted to the Surveyor General at San Francisco for examination, and then advertised and retained in his office for ninety days, and then transmitted to the Commissioner of the Land Office, at Washington, and examined by him before approval; it clearly appears that it could not have been finally approved, either on or before the date of Conlain's filing, May 25, 1868, or on or before the date of the suspension of the township plat, May 26, 1868. The cause of this suspension is not stated in the findings of the Court, but as it appears from said findings, as well as the law relating to the survey of private land claims, that the survey of the Sausal Redondo rancho could not have been and was not, then approved, and as the grant claim estopped and precluded the government from disposing of any and all lands within the township, embraced within the limits of said claim, until such approval; and no other cause whatever, for the suspension appears, it is to be presumed that said suspension was originally made, and that it was continued, because of the pendency of the survey of said grant claim; and that the approval of said survey was not until at or about the time of the release of the township plat from suspension, November, 21, 1871. The Court and jury having found that the lands in controversy were within the claimed limits of the aforesaid grant, at the date of Conlan's filing, May 25, 1868; and it appearing that the suspension of the township plat on the very next day was because of the pendency of the survey of the grant, and that that claim worked a reservation of the lands in contro-

versy, it must be presumed that they continued in a state of reservation, until the contrary appeared. Greenleaf on Evidence, volume 1, page 54, section 41. The contrary did not appear until the release of the township plat from suspension, November 21, 1871, for this was the first act affecting the *status* of said lands after the suspension of said plat, on May 26, 1868. If we are permitted to refer to the testimony of Alfred James, register of the land office, (Record page 18) these presumptions will be made conclusive. He testified that the township plat was suspended from May 22, 1868, until November 21, 1871, in consequence of the pendency of the Sausal Redondo claim; that the survey of the claim, excluding the lands in controversy, was finally approved October 31, 1871, and that the Secretary of the Interior ordered the township plat to be filed November 21, 1871, and that thereupon it became final.

The presumptions are, however, in themselves sufficient to show, in the absence of opposing evidence, that the lands in controversy were not released from reservation and made subject to pre-emption, until November, 1871. Consequently it was not till then that either Conlan or Quinby could have initiated a pre-emption claim upon, or acquired, in any manner, a right to them under the pre-emption laws. What the parties did upon or in relation to said lands before that time can only be resorted to for the purpose of showing their respective equities, and their relations to the land at the time they were released from reservation and made subject to pre-emption; and not to determine the legality or illegality of their pre-emption claims. This must be determined by what they did upon or in relation to said lands after they became subject to pre-emption. The question to be determined is, which, if either, of the parties became a settler upon the lands in controversy, on or after they were made subject to pre-emption, with the intention of acquiring title to the same, and proceeded to comply, in good faith, with the requirements of law to perfect his right to them. On this question the findings of the Court and jury leave no room for uncertainty or doubt. They show that Conlan did not occupy, reside upon, improve, cultivate or claim said lands by the filing of a declaratory statement, either on the date of their release from reservation or afterwards; and that he could not have done so, legally, because they were, at the date of such release, and ever afterwards, in the actual possession of Quinby and used by him exclusively. They will further show that, even, at the time of Conlan's settlement upon an adjacent tract in 1865 the lands now in controversy were actually occupied and possessed by others, and that their possession had been continued, without break or interruption, though their grantees and successors, including Quinby. They will further show that Conlan's settlement had been confined to such adjacent tract, and

that he never had occupied, inhabited, improved, cultivated or used the lands in controversy in any manner, or at any time; and that he had made statements, or representations to the effect that he did not intend to claim the same. They will further show that, at the time of the release of the lands in controversy from reservation, they had been enclosed, and were in the actual and exclusive possession of Quinby, who was residing upon them with the intention of pre-empting the same, that he had a dwelling house and other improvements thereon; that he had been and was improving, cultivating and using said lands as his home; that he thereafter continuously occupied, resided upon, improved, cultivated and used the same; that he filed a declaratory statement claiming the same, as a pre-emptor, November 23, 1871, and that he was prevented from perfecting his claim and title by a decision of the land department, awarding said lands to Conlan, notwithstanding these facts.

It is clear, from these findings, that Quinby became a settler on the lands in controversy with the intention of pre-empting the same, at and after the time of their release from reservation, and that Conlan did not; that Quinby proceeded to comply with the requirements of law, in good faith, in the matter of residence upon and the improvement, cultivation and use of the same, to perfect his right thereto, and that Conlan did not; that Quinby filed a declaratory statement, claiming said land as a pre-emptor, in due time and manner, after the same were released, and made subject to pre-emption, and that Conlan did not; and, in short, that Quinby did everything required by law to give him a right to said lands, as a pre-emptor, and that Conlan did nothing whatever to give him such right. It follows that the land department mistook and misconstrued the law relating to pre-emptions and pre-emption rights, and erred when it rendered a decision denying Quinby's right, and allowing Conlan to enter said lands and receive a patent therefor; and that the entry and the patent were void as against Quinby. The record is defective in not showing more precisely the issues presented to and decided by the land department, but it contains enough to show that it denied Quinby's claim and right and allowed Conlan to enter said lands on a settlement, alleged and shown to have been made in February, 1865, and a filing made May 25, 1868, both of which were while said lands were legally reserved, and before they became subject to pre-emption. In doing so it misconceived and misconstrued the law of the case. The authorities already cited by us, show conclusively that no right of pre-emption could have vested in Conlan by virtue either of a settlement or filing made before the lands became subject to pre-emption; that both were null and void, under the pre-emption laws. Conlan acquired no shadow of right as a pre-emptor by either; and the Court below not only erred in finding

and holding that he had become entitled to said lands, or the possession thereof, and that he should recover the same; but in finding and holding that Quinby had no interest or estate therein, and that he should take nothing by his cross complaint.

Quinby's filing was unquestionably in due time. The lands being unoffered, he had three months from the date of settlement, after they became subject to pre-emption, in which to make his filing. He made it, as we have already shown, within two days after they were released from reservation; and the township plat restored to the land office. The restoration was on the 21st day of November, 1871. His filing was made on the 23d day of that month. But it may be claimed that it was not within three months from the date of the original filing of the township plat in the land office, April 22, 1868. As the lands were then reserved and not subject to pre-emption, a filing was not required by law, and no legal filing was possible; and besides the plat was suspended before three months had expired, and was not released from suspension until November 21, 1871, and the time that it was suspended cannot be counted against Quinby. The suspension barred all filings. He was, therefore, in due time in any view of the case, and no laches can be imputed to him in this or any other matter or thing. From the moment the lands in controversy became subject to pre-emption he complied with every requirement of law, except in so far as he was prevented by the erroneous action of the officers of the land department, in awarding the lands to Conlan and allowing him to enter and receive a patent for the same. They undoubtedly assumed that because the lands in controversy were not included within the limits of the final and approved survey of the Sausel Redondo grant, made in February, 1868, and approved October 31, 1871, that they became subject to pre-emption at the date of the survey instead of the date of the approval thereof; and this appears to have been the opinion of the Court, (Finding 6, Record, page 26.) This view of the matter was and is erroneous. The lands were claimed to be within the limits of the grant, and consequentally, according to law and the authorities hereinbefore recited, reserved, until the approval of the survey in 1871. Not until then was the grant claim definitely and finally disposed of, and the lands released from reservation and made subject to pre-emption. We think it plain, from what we have shown that the court below erred in rendering judgment in favor of Conlan, and we respectfully ask that that judgment may be reversed. All the equities are with Quinby, and Conlan's title is void as against him.

Respectfully,

WILLIS DRUMMOND, AND
ROBERT H. BRADFORD,
Attorneys for Quinby.

OFFICE SUPREME COURT U. S.
FILED
DEC 1 1881
JAMES H. MCKENNEY, Clerk.

Supreme Court of the United States.

October Term, 1881.

HIRAM QUIMBY, PLAINTIFF IN ERROR,
vs.
ANDREW CONLAN.
No. 163.

This is an appeal from the Supreme Court of the State of California. The action was commenced in the District Court for Los Angelos county, in that State, by the defendant in error, Andrew Conlan, and tried before the court and a jury and verdict rendered for the plaintiff Andrew Conlan, and judgment entered in his favor January 31, 1878. The defendant Hiram Quimby, plaintiff in error, appealed to the Supreme Court of the State April , 1878, and that court, after hearing had, affirmed the judgment of the court below.

It being claimed that the case involved, among others, the question of the construction of the pre-emption laws of the United States, a writ of error was obtained to this court.

POINTS.

I.

It is difficult to find from the record any ground for the appeal or for the writ of error.

The trial was by jury, and no exceptions appear in the record.

All of the errors assigned except the first—that "the judgment is against the findings and against law"—are for errors of the jury in finding against the evidence. (R., pp. 23 and 24.)

II.

The jury found that the land in controversy was duly surveyed by the United States authorities in the month of February, 1868; that the township plat embracing said lands was duly filed in the United States Land Office, April 22, 1868; that the defendant in error entered upon the lands, claiming them as a pre-emptor, February 4, 1865, and within three months after the filing of the township plat in the United States Land Office, to wit, on the 25th day of May, 1868, duly filed his declaratory statement in form as required by law as a pre-emptor of said lands.

That the jury were correct in their finding of the time of the survey of the land, will be seen by the testimony of the surveyor. (R., pp. 22 and 23.)

In *Wirth* v. *Branson*, 98 *U. S.*, 121, the court say:

"The rule is well settled by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. * * *

"This was laid down as a principle in the case of *Lytle et al.* v. *The State of Arkansas*, 9 *How.*, 314, and has ever since been adhered to. (See *Stark* v. *Starrs*, 6 *Wall.*, 402.)"

III.

The jury found that the land in controversy had been surveyed and determined to be public lands at the time

the defendant in error filed his declaratory statement, and that they were then subject to pre-emption. This is conclusive, and established the title in the defendant in error.

In *Meador* v. *Norton*, 11 *Wall.*, 457, 458, the court say:

"Argument is not necessary to show that a patent in a suit at law is conclusive evidence of title against the United States and all others claiming under the United States by a junior title. Until the patent issues the fee is in the Government; but when it issues the legal title passes to the patentee."

IV.

It was claimed on the trial in the court below that the plaintiff had obtained his patent by fraudulent statements and representations to the Land Office, by means whereof the officers of the Land Office were misled as to the facts of the plaintiff's settlement on the disputed land. But the jury found no fraud had been attempted or practiced by the plaintiff in procuring his patent. (See R., p. 28.) And the court determined (see R., p. 26) that "none of the officers of the United States Land Department were in any manner deceived or misled as to any fact in controversy, nor were they induced by any false or fraudulent evidence to award the land to the plaintiff."

It is clear that the plaintiff in error has shown no such state of facts as would establish his right to have the title of the defendant in error to the lands in controversy set aside. He has not shown any such mistake in law, or any such element of fraud. as would justify a court of equity in setting aside the judgment of the Land Offiice and the judgment of both the District and Supreme Courts of the State of California.

Marquez *v.* Frisbie, 101 U. S., 473.

Vance *v.* Burbank, 101 U. S., 514.

V.

It is claimed that the jury, having found that the land in question was, at the time of the filing of the declaratory statement by the defendant in error, May 25, 1868, within the claimed limits of the Sansal Redondo Rancho; that under the provisions of the act of March 3, 1851, providing for the adjustment of private land claims in said State, the said lands were not then public lands and subject to pre-emption.

The record (pp. 9 and 10) shows that the said rancho was surveyed under the eighth section of the act of July 23, 1866, entitled "An act to quiet land titles in California." This section is as follows:

"SECTION 8. * * * That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections 6 and 7 of the act of July 1, 1864, 'to expedite the settlement of titles to lands in the State of California,' and in all cases when a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested as provided by said section within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the Surveyor-General of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general laws of the United States: *Provided*, That nothing in this act shall be construed so as in any manner to interfere with the right of bona-fide pre-emption claimants." (Stats. at Large, vol. 19, chap. 219, sec. 8, p. 220.)

When the survey was made under this act (R., pp. 9 and 10) it was determined that the lands in question were not within the claimed limits of the Rancho, and hence were subject to the general land laws of the United States.

Under the survey this township was platted, and the plat filed April 22, 1868, and was then, prior to the filing of the declaratory statement by the defendant in error, subject to pre-emption.

The grant claimants may have claimed the land in question as found by the jury, and caused the suspension of the plats in the local office from time to time until finally restored, June 11, 1872; but the final determination by the land office that the official survey had been correctly made, left the land subject to pre-emption as of the date of the filing of the original plat.

The court, therefore, did not err in applying the law to this state of facts.

J. Coleman,
Att'y for Deft. in Error.

14-427

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1,171.~~ 820

JOHN W. BOUGHTON, PLAINTIFF IN ERROR,

vs.

THE AMERICAN EXCHANGE NATIONAL BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED MARCH 30th, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1,171.

JOHN W. BOUGHTON, PLAINTIFF IN ERROR,

vs.

THE AMERICAN EXCHANGE NATIONAL BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 In the Supreme Court of the Commonwealth of Pennsylvania for the Eastern District.

[SEAL.] Among the records and proceedings of the Supreme Court of Pennsylvania for the Eastern District, to January term, 1880, No. 134, inter alia, it is thus contained:

Appearance Docket.—January Term, 1880.

Greenbank. 134	John W. Boughton, Plaintiff in Error, vs. American Exchange.	Writ of error to the Court of Common Pleas of the County of Philadelphia, No. 3. Ret'ble the first Monday of Feb'y, 1880. Exit Dec. 23d, 1879. Feb'y 2, '80. Record ret'd and filed. " " Assignments of er'r filed. Jan'y 4, 1881. Argued. Jan'y 24th, 1881. Judgment Affirmed, Greene, J. Feb'y 5th, 1881. Appeal to Supreme Court of United States, filed Feb'y 3d, 1881.

Certified from the record, Mar. 25th, 1881.

CHAS. S. GREENE,
Prothonotary S. C.

2 UNITED STATES OF AMERICA, *ss.*

[SEAL.] The President of the United States to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between John W. Boughton, plaintiff in error, and The American Exchange National Bank, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
3 their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint

appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourth day of February, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY, *Associate Justice Sup. Ct. U. S.*

(Endorsed:) Filed Feb. 5th, 1881.

4 The United States of America to The American Exchange National Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Pennsylvania, wherein John W. Boughton is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, Associate Justice of the Supreme Court of the United States, this fourth day of February, in the year of our Lord one thousand eight hundred and eighty-one.

JOSEPH P. BRADLEY,
Associate Justice Sup. Ct. U. S.

5 *Exemplification.*

PHILADELPHIA COUNTY, } *Set.*
STATE OF PENNSYLVANIA. }

Among the records and proceedings of the Court of Common Pleas, No. 3, for the County of Philadelphia, State of Pennsylvania, may be found, as matter of file and record, at No. 941, March term, 1879, to wit:

Docket Entries.—March Term, 1879.

	American Exchange National Bank vs. John W. Boughton. May 8, 1879. Copy of note filed. May 23, 1879. Afft. of defence filed.	Sums. case. Exit May 1, 1879. Ret. 1 Mon. May, 1879. June 4, 1879. Rule for judgment for want of a suff. afft. of defence. Dec. 4, 1879. Rule absolute. Dec. 23, '79. Dams. assed. @ $488.01. Dec. 24, 1879. Writ of error brought into office. (SC. Jan'y, '80. 134.

Certified from the record, January 31st, 1880.

(Sgd.) E. LINDSAY, *pro Prothy.*

6 C. C. P., No. .—March term, 1879.

AMERICAN EXCHANGE NATIONAL BANK
vs.
JOHN W. BOUGHTON. } No.

Prothonotary Court of Common Pleas: Issue summons case as above, returnable next return day.

(Sgd.) MONTGOMERY,
(Sgd.) WAGNER,
Plaintiff's Attorneys.

Endorsements as follows: 941. March term, 1879. C. C. P., No. 3. American Exchange National Bank vs. John W. Boughton. Præcipe for summons case. Montgomery. S. Wagner, jr.

7 *Summons.*

COUNTY OF PHILADELPHIA, *ss.*

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of Philadelphia County, greeting:

We command you, that you summon John W. Boughton, late of your county, so that he be and appear before our judges, at Philadelphia, at our Court of Common Pleas, No. 3, for the county of Philadelphia, to be holden at Philadelphia, in and for said county of Philadelphia, the first Monday of May, inst., there to answer American Exchange National Bank of a plea of trespass on the case, etc. And have you then there this writ.

Witness the Honorable James R. Ludlow, president of our said court, at Philadelphia, the 1st day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

(Sgd.) JAS. W. FLETCHER, *pro Prothonotary.*

I hereby accept service of the within writ, and the prothy. is requested to enter my appearance for the defendant.

(Sgd.) THOS. GREENBANK,

May 1st, '79. *For Deft.*

(Endorsed:) 941. March term, 1879. C. P., No. —. American Exchange National Bank vs. John W. Boughton. Summons case. Montgomery. S. Wagner, jr.

8 C. C. P., No. 3.—March term, 1879.

AMERICAN EXCHANGE NATIONAL BANK
vs.
JOHN W. BOUGHTON. } No. 941.

The plaintiff in the above case files the following, a copy of the promissory notes upon which its suit is brought:

$203. PHILADELPHIA, *June 15th*, 1878.

Four months after date, I promise to pay to the order of E. L. Hussey, two hundred and three dollars, at S. S. Harris', 658 Broadway, N. Y., without defalcation, value received.

(Signed) JOHN W. BOUGHTON.

(Endorsed:) E. L. Hussey. Saml. S. Harris. Protest fee, $1.60.

$250. PHILADELPHIA, *June* 21, 1878.

Four months after date, I promise to pay to the order of E. L. Hussey, two hundred and fifty dollars, at S. S. Harris', 658 Broadway, N. Y., without defalcation, value received.

(Signed) JOHN W. BOUGHTON.

(Endorsed:) E. L. Hussey. J. B. Keltz. Protest fee, $1.60.

(Endorsed:) 941. M. T., 1879. C. C. P., No. 3. American Exchange Nat. Bank vs. Boughton. Copy promissory note. Filed May 8, '79. Montgomery. S. Wagner, jr.

9 *Affidavit of Defence.*

CITY AND COUNTY OF PHILADELPHIA, *ss.:*

John W. Boughton, being duly sworn, says, he has a just and legal defence to the plaintiff's claim in the above cause, as follows:

That the two notes, copies of which are filed in this case, were delivered to the payee, Hussey, doing business in New York and by him there endorsed. That they were executed by the defendant, and delivered to the said Hussey in New York simply as a matter of accommodation to said Hussey, and for the purpose of renewing two preceding accommodation notes given to said Hus-

sey, and in the hands of Samuel S. Harris, banker, at 658 Broadway, New York. That the said Hussey, in receiving the two notes now sued upon and before the maturity of the same, delivered them to said Harris in New York City in renewal of the two preceding notes and paid him therefor legal interest at seven per cent., and the further sum of twenty-five dollars on each of said notes as usurious interest.

The defendant suggests to the court that under the statute of New York, and the decisions thereon, the said notes are usurious and void even in the hands of third persons.

And the defendant in order to give a more detailed statement of the whole transaction further says that the indebtedness on said notes originated as follows:

In March, 1877, the said E. L. Hussey, of New York, payee of said notes, being desirous to borrow money, obtained in New York from the defendant his, the defendant's, accommodation note for $495.58, dated March 20, 1877, for three months to the order of said Hussey; the said note was executed by the defendant without any consideration and not in any business transaction between himself and Hussey, but simply as a matter of accommodation to said Hussey and to raise money for his benefit.

That on March 23, 1877, said Hussey delivered said note to Samuel Harris, banker, 658 Broadway, New York, who, with J. B. Keltz, his partner, there discounted the same and charged therefor for the loan, the sum of $33.77, being twenty-five dollars more than legal interest.

That said note matured June 23d, 1877, and was renewed by the said Hussey delivering to the said Harris at his office in New York, on June 21st, 1877, the defendant's accommodation note to the order of said Hussey for $490.00, at three months, and paying the said Harris for said renewal $33.86 interest, and $5.58 on account of the debt.

That, in order to renew said last note of $490.00, said Hussey delivered to said Harris, at his office in New York, on September 20, 1877, the defendant's accommodation note for $490.00, at three months, and paid for said renewal the sum of $33.67.

That in like manner said last-mentioned note was renewed by said Hussey delivering to Harris the defendant's accommodation note to Hussey, made for $490.00, at three months, on December 19th, 1877, and paying for said renewed loan $33.46.

Which last note was also renewed by Hussey delivering to said Harris the defendant's accommodation note to the order of Hussey, for $490.00, dated March 19th, 1878, at three months, and paying for the renewed loan $33.65.

10 This note was also renewed by Hussey delivering to Harris, in New York, on June 22d, 1878, two of the defendant's accommodation notes, one dated June 21st, 1878, at three months, for $240, and the other, being one of the notes now sued

on, dated June 21st, 1878, for $250.00, at four months, and paying for the renewed loan $35.28.

All of these transactions were in the city of New York, and the different sums paid for the renewal of the notes and of the loan were made up of legal interest at the rate of seven per cent., and the sum of $25.00 in each case as usurious interest. That said notes were all for the sole benefit and accommodation of said Hussey, and in no way based on any business transaction with the defendants.

That the said Samuel S. Harris and J. B. Keltz, indorsers on the two notes respectively, were partners in the discounting of said notes and making said loans.

The defendant further says that the note for $203.00 originated as follows:

In 1877, the said Hussey, in New York, obtained from the defendant his, the defendant's, accommodation note for $410, to the order of said Hussey, at three months, upon which the said Harris and Keltz, partners, in New York, loaned to Hussey the sum of $410.00, deducting as interest $32.18, which said note was renewed in like manner as the above-mentioned renewals by said Hussey delivering to said Harris the defendant's accommodation notes to the order of Hussey.

On July 2d, 1877, and paying for the renewal				.....	$32.33
On October 3, 1877,	"	"	"	.....	32.12
On January 4, 1878,	"	"	"	.....	31.97
On April 4, 1878,	"	"	"	.....	31.95

On July 3, 1878, by delivering to said Harris two of the defendant's accommodation notes, one for $203.00, dated June 15th, 1878, the note now sued on, and one for $195.00, dated July 3d, 1878, each to the order of Hussey, on which last renewal the said Hussey paid said Harris $32.00 as interest.

That all the said transactions were in the city of New York and that the said sums paid in the said several renewals consisted, in each case of the legal rate of interest in New York, at seven per cent., and the sum of $25.00 as usurious interest.

That the defendant had no business transaction with the said Hussey on which said notes were based; that the same were without consideration, and solely for the accommodation of the said Hussey, and given to raise money for his benefit, and not in the course of business.

All of which facts the defendant is advised, informed, and believes to be true, and expects to prove on the trial of the cause in court.

JOHN W. BOUGHTON.

Sworn and subscribed before me, the twenty-third day of May, A. D. 1879.

[SEAL.] JOHN BELL, *Notary Public.*

11 C. C. P., No. 3, March term, 1879.

AMERICAN EXCHANGE NATIONAL BANK
vs.
BOUGHTON. } No. 941.

Prothy. assess damage in above case as follows:

The amount of note of June 15, 1878	$203 00
Int. from Oct. 18th, 1878	14 31
Protest fee	1 60
Amount of note of June 21, 1878	250 00
Interest from Oct. 21, 1878	17 50
Protest fee	1 60
	$488 01

I assess damages as above.

STONE, *pro Prothonotary.*

23 December, 1879.

Endorsements as follows: 941, March, 1879. C. P., No. 3. American Exchange National Bank vs. Boughton. Assessment of damages. Filed Dec. 23, '79. Wagner.

12 EASTERN DISTRICT OF PENNSYLVANIA, *sct.*

The Commonwealth of Pennsylvania to the justices of the Court of Common Pleas for the County of Philadelphia.

[SEAL.] Greeting: Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ between John W. Boughton, plaintiff in error, and American Exchange National Bank, defendant in error, as it is said manifest error hath intervened, to the great damage of said plaintiff in error, as by complaint of the said plaintiff in error we have received information: We, willing that, if any error be therein, it should be corrected and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our Supreme Court of Pennsylvania, at a supreme court to be held at Philadelphia, in and for the Eastern District of said commonwealth, on the first Monday of February next, and this writ; that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable George Sharswood, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the twenty-third day of December, in the year of our Lord one thou-

sand eight hundred and seventy-nine, and of the commonwealth the one hundred and fourth.

S. ROBINSON, *Pro*
R. E. FLETCHER, *Prothonotary.*

(Endorsed on back :) No. 941, M. T., 1879. No. 134, January term, 1880. Supreme Court. John W. Boughton, plaintiff in error, vs. American Exchange National Bank, defendant in error. Writ of error to the Com. Pleas for the County of Philadelphia. Returnable the first Monday of February, 1880. Rule on the defendant in error to appear and plead on the return-day of the writ. I certify that John Alwine and E. C. Hussey are bail in error in the above case, in the sum of one thousand dollars ($1,000). Y. Robinson, pro prothy. Thos. Greenbank.

13 *Assignments of Error.*

The court below erred in entering judgment against the defendant, Boughton, for want of a sufficient affidavit of defence.

1. Because the notes sued on were negotiated in New York, were made payable there, and the usurious loan obtained upon them there, and the transaction thus subject to the laws of New York, the *locus contractus.*

2. Because the statute of New York provides that notes, bonds, etc., given for a loan on usurious interest are absolutely void, even in the hands of a *bona-fide* holder.

14 BOUGHTON *vs.* AMERICAN EXCHANGE NATIONAL BANK. } Error to the Court of Common Pleas, No. 3, Philadelphia.

GREEN, J.: The defendant in this case claims that, although the notes in suit are dated at Philadelphia, they are payable in New York, and he argues that they are to be governed by the law of New York. He further contends that, by the law of that state, such securities as these, although on their face they purport to be ordinary business paper, may be shown to be accommodation paper, and, such being the fact, that they are void by the statute law of New York, as interpreted by the courts of that state.

He argues that this consequence follows even as against innocent third persons, who take them in the regular course of business before maturity, for full value actually paid, and without notice of any taint, if, in point of fact, as between the original parties, they were in any manner affected with usury. It is needless to say that in this commonwealth such a defence would not
15 be listened to in any court of justice, if the transaction were a Pennsylvania contract. Of course, in order to maintain such a defence in our courts upon the ground that it is a good defence by the law of New York, it is absolutely essential in an

affidavit of defence, to aver, and on the trial to prove, by competent testimony, that the law of New York is in accordance with the contention. The question, what is the law of another country or state, when that law is set up in a litigated cause, is a pure question of fact. "The established doctrine now is that no court takes judicial note of the laws of a foreign country, but they must be proved as facts."—(Sto. Conf. of Laws, § 637.) See, also, Whart. Law of Evidence, § 300, and § 304 to 312, inclusive, as to the necessity and kind of proof required in such cases.—(Ripple vs. Ripple, 1 R., 386.) The laws of another state, a member of the Union, are to be proved as the laws of a foreign country. It is well settled that, in the absence of proof, the law of the state where the contract was made, will be presumed to be the same as the *lex fori*.—(20 P. F. S., 277-8, and cases cited.)

The defence in the present case is brought before us in
16 an affidavit of defence. The only averment in the affidavit upon this subject is in the following words: "The defendant suggests to the court that under the statute of New York, and the decisions thereon, the said notes are usurious and void even in the hands of third persons." If this mode of stating facts were to be used as to any ordinary matter of fact, it would not be tolerated as a sufficient statement. The averment under consideration is, at the best, a mere suggestion, and not an assertion of anything. Even if it were an assertion, it should be very much more specific than it is. No statute is quoted, either in words or by any statement of its substance. No decisions of any courts are described, or even referred to, as establishing any particular rule of law. It is very certain that no statute and no decisions of New York ever declared "that said notes are usurious and void even in the hands of third persons." And yet this is the whole of the averment. It cannot be anything more than the opinion of the affiant that, under some statute of New York, and the decisions thereunder, the particular notes upon which this suit is
17 founded are void. But this is altogether inadequate. In Peck vs. Jones, 20 P. F. S., 83, we held that an affidavit of defence should aver distinctly every fact necessary to constitute a defence—nothing should be left to inference. There are many other cases to the same effect.

An affidavit of defence should state specifically and at length the nature and character of the defence relied on, and should set forth such facts as will warrant the legal inference of a full and legal defence to the plaintiff's cause of action.—(Bryor vs. Harrison, 1 Wr., 233; Woods vs. Watkins, 4 Wr., 458.) How could the court below, or how can we, determine from the *facts* set out in this affidavit, whether "the said notes are usurious and void even in the hands of third persons?"

We are asked to make a solemn decree to that effect, but upon what information on which we can be permitted to found such a

judgment? Absolutely none. It is too plain for argument that no indictment for perjury could be maintained for the falsity of the averment we are considering. It alleges no fact, and
18 the opinion which it expresses may, for aught else contained in the affidavit, be entirely erroneous. This affidavit of defence is insufficient, and the court was right in entering judgment for the plaintiff. The excessive payments made by Hussey, the payee, to Harris, the bill-broker, constitute no defence in favor of the maker, Boughton, against the plaintiff, an innocent holder.

Judgment affirmed.

Endorsed as follows: No. January term, 1880. Jno. W. Boughton vs. American Exchange National Bank. Error to Com. Pleas, No. 3, Philadelphia. Judgment affirmed. Green, J. Filed Jan. 24, 1881.

19 Supreme Court of Penna., Eastern District.
Jan'y term, 1880.

JOHN W. BOUGHTON
vs.
AMERICAN EXCHANGE NAT. BANK. } No. 134.

The petition of John W. Boughton respectfully represents: That in January, 1880, he *purchased* a writ of error from the Supreme Court of Penna., directed to the judges of the court of common pleas, No. 3, for the county of Philad., commanding them to certify to said supreme court the record and proceedings of a certain cause then pending in said court of common pleas, wherein the American Exchange Nat. Bank was plaintiff, and your petitioner, John W. Boughton, defendant. And the said court of common pleas, No. 3, had entered judgt. against your petitioner and assessed the damages at $488, on Dec. 23, 1879.

The record of the case was thereupon removed by writ of error to the Supreme Court of Penna., where your petitioner filed the following assignment of error inter alia: "Because the notes sued on were negotiated in New York, were made payable there, and the usurious loan obtained upon them there, and the transaction was thus subject to the laws of New York, the *locus contractus*." But the said courts refused to take cognizance of the statutes of New York relating to the said subject-matter, which your petitioner avers is contrary to the art. IV. of the Constitution of the United States, which provides: "Full faith and credit shall be given in each state to the public acts, records, &c., of every other state." And your petitioner avers that the said supreme court affirmed the judgment of the said court of common pleas, whereby your petitioner will be compelled to pay the amount of a judgment which your petitioner avers to be unconstitutional, and draws in

question the construction of the first clause of the IVth article of the Constitution of the United States.

Your petitioner further shows that the said decision of the said supreme court is a decisive and final judgment in the highest court of law of said State of Pennsylvania in which a decision in said suit could be had, that the right, privilege, and exemption claimed by your petitioner was claimed by him under the Constitution of the United States, and that the said decision of the said supreme court is against the right, privilege, and exemption claimed by your petitioner.

Your petitioner further shows that the truth of all the aforesaid averments as to said proceeding will appear by record thereof in the Supreme Court of Penna. for the Eastern District.

Your petitioner, therefore, prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Pennsylvania, and the Court of Common Pleas, No. 3, of the County of Philadelphia, to remove said
20 record into the Supreme Court of the United States, that the said decision of the Supreme Court of Penna. may be examined and reversed or affirmed in said Supreme Court of the United States, as to right and justice may appertain.

And your petitioner will ever pray, &c.

JOHN W. BOUGHTON.

CITY AND COUNTY OF PHILADELPHIA, *ss.*

John W. Boughton, the petitioner above named, being duly sworn according to law, says that the facts above set forth are true to the best of his knowledge and belief.

JOHN W. BOUGHTON.

Sworn and subscribed before me, this 29th day of January, 1881.

FRANK I. THOMPSON, *Notary Public.* [SEAL.]

The writ of error is allowed in this case.

Feby. 4, 1881. JOSEPH P BRADLEY,
Associate Justice Sup. Ct.

(Endorsed on back:) 134, Jany. T., 1880. Supreme Court of Penna. for the Eastern District. Jno. W. Boughton, plaintiff in error, vs. American Exchange National Bank, defendant in error. Writ of error to Supreme Court of Penna. is allowed to be issued out of the Supreme Court of the United States.

21 *Know all men by these presents*, That we, John W. Boughton and John Alwine, both of the city of Philadelphia and State of Pennsylvania, and Frederick Gaston of said city, are held and firmly bound unto American Exchange National Bank, in the full and just sum of nine hundred and seventy-six dollars, to be paid unto the said American Exchange National Bank, their cer-

tain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this third day of February, in the year of our Lord one thousand eight hundred and eighty-one (1881).

Whereas, lately, at a session of the Supreme Court of the Commonwealth of Pennsylvania, for the Eastern District, in a suit depending in said court between John W. Boughton, plaintiff in error, and American Ex. National Bank, defendant in error, judgment was rendered against the said John W. Boughton, and the said John W. Boughton, plaintiff in error, having obained
22 an allocatur, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said the Supreme Court of Pennsylvania, in the nature of a writ of error, and also the American Exchange National Bank, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such, that if the said John W. Boughton shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Sgd.) JOHN W. BOUGHTON. [SEAL.]
(Sgd.) JOHN ALWINE. [SEAL.]
(Sgd.) FRED. GASTON. [SEAL.]

Sealed and delivered in presence of—

(Sgd.) THOS. GREENBANK.

Approved by—

(Sgd.) JOSEPH P. BRADLEY,
Associate Justice Sup. Ct. U. S.

CITY AND COUNTY OF PHILADELPHIA, *ss.*

John Alwine, within-named obligor, being duly sworn according to law, says that he is the owner of real estate, No. 2619 Ellsworth st., in the city of Philadelphia, is worth *of* over two thousand dollars, is clear of all incumbrances, and the title thereto is in the deponent's name.

The deponent is also the owner of other portions of real estate in said city, and is worth over five thousand dollars, clear of all incumbrances, in said city.

(Sgd.) JOHN ALWINE.

Sworn and subscribed before me, this 3d day of Feb'y, 1881.

[SEAL.] (Sgd.) HENRY W. GIMBER,
Notary Public.

24 S. C. of Penn'a, E. D.

JOHN W. BOUGHTON *vs.* AMERICAN EXCHANGE NATIONAL BANK.	No. 134 of January term, 1880.

COMMONWEALTH OF PENN'A, *ss.*

I, Charles S. Greene, prothonotary of the Supreme Court of Pennsylvania for the Eastern District, do hereby certify that the above and foregoing pages contain a true copy and correct transcript of the record and proceedings in the said , so full and entire as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Philadelphia, this 25th day of March, A. D. 1881.

[SEAL.] CHAS. S. GREENE,
Prothonotary S. C. of Penn'a, E. D.

25 COMMONWEALTH OF PENNSYLVANIA, *ss.*

I, George Sharswood, Chief Justice of the Supreme Court of the Commonwealth of Pennsylvania, do hereby certify that Charles S. Greene, by whom the foregoing certificate was made, was at the time of so making the same, and is now, the prothonotary of said court, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; that the seal thereto annexed is the seal of the said court; and that the attestation and certificate aforesaid, so made by him, is in due form.

In testimony whereof, I have hereunto set my hand, this 25th day of March, A. D. 1881.

GEO. SHARSWOOD.

(Endorsed on cover:) Pennsylvania Supreme Court. No. 1,171. John W. Boughton, plaintiff in error, vs. The American Exchange National Bank. Filed 30th March, 1881.

Supreme Court of the United States.

WRIT OF ERROR TO SUPREME COURT OF PENNSYLVANIA.

JOHN W. BOUGHTON,

PLAINTIFF IN ERROR,

vs.

AMERICAN EXCHANGE NATIONAL BANK,

DEFENDANT IN ERROR.

MOTION TO DISMISS WRIT.

Argument of Plaintiff in Error.

THOS. GREENBANK,

Attorney for Plaintiff in Error.

PHILADELPHIA:

GEO. F. LASHER, STEAM-POWER PRINTER, 605 and 607 ARCH ST.

1881.

SUPREME COURT OF THE UNITED STATES.

JOHN W. BOUGHTON Plaintiff in Error, *vs.* AMERICAN EXCHANGE NAT. BANK, Defendant in Error,	Writ of Error to the Supreme Court of Pennsylvania.

MOTION TO DISMISS WRIT OF ERROR.

STATEMENT BY PLAINTIFF IN ERROR.

This suit was brought against the defendant below, John W. Boughton, on two notes drawn by him for accommodation, amounting to $453, on which a loan was obtained in the city of New York by the accommodation holder, at a highly usurious rate.

Besides the legal rate, there had been paid to the lender as usury, the sum of $350.

The plaintiff below, hoping to avoid the stringent law of New York, prohibiting usurious loans, caused a writ to be served on the defendant Boughton, in Philadelphia.

In the first stage of the proceeding, the defendant put on record his affidavit of defence (Brief of Def't. in Error, p. 2), stating therein the nature and character of his defence, viz.: that the loan was usurious, and that the transaction was in New York, and claimed the benefit of the statute of New York in the adjudication of his case.

That Statute is entitled as follows: "An Act to prevent Usury," passed May 15th, 1837 (Digest of Laws New York, Fay, vol. 3, p. 371), and provides that "All "bonds, bills, assurances, conveyances, and all other "contracts or securities whatsoever (except bottomry "bonds, &c.), and all deposits of goods, or other things "whatsoever, whereupon or whereby there shall be re-"served, or taken, or secured, or agreed to be reserved "or taken any greater sum or greater value for the "loan or forbearance of any money, than as above "described (7 per cent.) shall be void."

On the argument for judgment in the subordinate court, the counsel quoted, accepted and discussed the New York statute, and the court took cognizance of it, but nevertheless entered judgment against the defendant, rendering no opinion

On a writ of error to the Supreme Court of the State, the plaintiff in error filed the following assignments of error:

"The Court below erred in entering judgment against the defendant, Boughton, for want of a sufficient affidavit of defence.

1. Because the notes sued on were negotiated in New York, were made payable there, and the usurious loan obtained upon them there, and the transaction was thus subject to the laws of New York, the *locus contractus*.

2. Because the statute of New York provides that notes, bonds, etc., given for a loan on usurious interest are absolutely void, even in the hands of a *bona fide* holder." (Transcript of record, p. 8).

Both in the oral and printed argument of counsel in that court the statute of New York was admitted and received, and the discussion was upon its application to the facts. But the Supreme Court affirmed the judgment upon an exceedingly narrow verbal criticism.

From the beginning to the end of the case, it was not suggested or hinted that the statute and decisions of New York were not before the court, and could not be considered in determining the case.

But the court turned away from the question and the arguments submitted, and put the case on a technicality not raised by either party, by which no force or effect is given to the New York statute, and the defendant below is denied the benefit of his just and legal defence, under the Constitution and laws: because the defence of usury happens to be odious in the Court of Pennsylvania at present.

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1. Because the notes sued on were negotiated in New York, were made payable there, and the usurious loan obtained upon them there, and the transaction was thus subject to the laws of New York, the *locus contractus*.

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But the court turned away from the question and the arguments submitted, and put the case on a technicality not raised by either party, by which no force or effect is given to the New York statute, and the defendant below is denied the benefit of his just and legal defence, under the Constitution and laws: because the defence of usury happens to be odious in the Court of Pennsylvania at present.

ARGUMENT OF PLAINTIFF IN ERROR.

The motion is to dismiss the writ of error for want of jurisdiction.

If the case comes within the 25th section of the Judiciary Act, and if the judgment of the Court of Pennsylvania impugns the provisions of the Constitution, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, then a federal question arises, and this court has jurisdiction.

I. Whether such a question did arise, is to be determined by the record of the case.

In Furman *vs.* Nichol, 8 Wallace 56, the Court say: If the record shows either by express averment or by clear and necessary intendment, that the constitutional question did arise, and that the State Court could not have reached the conclusion it did without applying it to the case in hand, the Supreme Court has jurisdiction.

In Bridge Co., *vs.* Hoboken Co., 1 Wal. 142, the Court say: It is not necessary that the question should appear on the record to have been raised *ipsissimis verbis*,—but it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment.

The true and rational rule is, that the Court must be able to see clearly from the whole record that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.

In Murray *vs.* Charlestown, 6 Otto 442, it is held that the true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided and adversely to the federal right. Very little importance has been attached to the inquiry whether the federal question was formally raised.

And in Pennywit *vs.* Eaton, 15 Wal. 380, the Court refused to dismiss the writ of error for want of jurisdiction in a case brought here, as within the 25th section of the Judiciary Act, when they could see a federal question raised under it, though raised somewhat obscurely.

Parmalee *vs.* Lawrence, 11 Wal. 36, cited in the Brief of Def't. in Error, p. 11, was a case where neither in the pleadings, nor in the evidence, nor at the hearing in the Superior Court, was any question made as to the validity of any statute. The question was first made in the Supreme Court on the writ of error.

The case of The Victory, 6 Wal. 382, cited by def't. in error, p. 11, was a case of a libel for supplies under the State Statute. The contest throughout was about the amount of the supplies. No question of exclusive admiralty jurisdiction was raised; the defendant impliedly admitted the jurisdiction of the State Court, and the validity of the statute. He merely denied that the full amount was due. The Superior Court was not called on to consider the federal question at all, and therefore it could not be considered here.

In the present case, the record distinctly shows not only by necessary intendment but by express averment, that the one question of giving full faith and credit to the Statute of New York, arose in every

stage of the proceeding. First, in the affidavit of defence (Record, p. 5). Second, in the assignments of error in the Superior Court (Record, p. 8). The State Court, it would seem from the record, must needs have decided that federal question, and none other; the statements of the affidavit being accepted, and no cause of exception or demurrer being filed to any supposed incompleteness in the manner of the statement, which then could have been amended.

II. The opinion of the Court below is not a part of the record, and cannot be referred to in ascertaining the jurisdiction.

In Rector *vs.* Ashley, 6 Wal. 148, the Court say: "We have of late, been frequently urged in this class of cases to look at the opinions delivered in the State Courts to ascertain on what ground the judgments were based. It is not now an open question. More than forty years ago, the same question arose in the case of Williams *vs.* Norris, 12 Wh. 117. Marshall C. J. said that, notwithstanding the opinion of the State Court was filed, it constituted no part of the record, and could not be looked to as the foundation on which this court would take or refuse jurisdiction. Leaving out the opinion of the State Court there is nothing in the record before us to show that there was any other than a federal question decided."

Rector *vs.* Ashley, cited by the defendant in error (brief, p. 11), is a strong case for the plaintiff in error. In that case it appeared by the opinion of the Supreme Court of the State, that the statute of limitations was one of the grounds on which the appellants had been dismissed. This, if fairly in the record, was a sufficient ground for such dismissal and was not subject to review here. But this court held that the opinion

of the State Court, even though required by the statute of the State to be filed among the papers of the case, constituted no part of the record, and would not presume that the statute of limitations was a defence in the case, and accepted the case as a proper one for a writ of error under the 25th section of the Judiciary Act.

The argument of the defendant in error here is based entirely on the opinion of the Court below, and if that opinion be eliminated from the cause according to the ruling in Rector *vs.* Ashley, then the question of federal cognizance and nothing else is patent on the face of the record.

III. But the State Courts as well as the Courts of the United States, will take judicial notice of the statutes of the several states in causes where a federal question arises. While it is confessedly the rule that the laws of foreign countries, wholly alien to each other, must be proved as facts, a different principle applies among States, like those of the Union, which are for many purposes, one nation and governed by the same organic statute.

1st. In regard to suits in one State on judgments from another State.

The Act of Congress requires that the acts, records and judicial proceedings of other State, shall have the same faith throughout the United States, as in the place where they originated. Obviously, a court cannot give the judgment of another State the effect which it would have had in the court where the judgment was pronounced, without consulting the law of the original forum, and ascertaining what it prescribes. A magistrate who has to determine such a question, is necessarily entitled, if not bound, to have

recourse to every appropriate source of judicial knowledge. This inference is the more reasonable, because the adjudication of the courts of the various states form a body of jurisprudence which is habitually consulted through authentic channels. It would seem to be necessary then in ascertaining the credit due to the judgments of a sister State that judicial notice should be taken of the law of the original, as well as of the domestic forum: Mills *vs.* Duryee, 7 Cranch 481. The State of Ohio *vs.* Hinchman, 27 Penna. St. R. 479; Ennis *vs.* Smith, 14 Howard 400; Wilson *vs.* Jackson, 10 Missouri 336.

In the case of Baxley *vs.* Linah, 16 Pa. St. Rep 243, Judge Lewis says: "In the case of Mills *vs.* Duryee, 7 Cranch, 481, the Court of the District of Columbia and the Supreme Court of the United States took notice, without proof, of the local law of New York, and of the effect of a judgment recovered in that State. The question was decided on demurrer to the plea of *nil debet*, without hearing evidence, and without averment of the local law. In Clark *vs.* Day, 2 Leigh's (Va.) Rep. 172, the court held that the Act of Congress has made the judgments of other States domestic judgments, and took notice of the local law, without proof, sustaining the position taken in this respect by an argument not readily answered."

Judge Lewis, in the same case, p. 243, also says: "In cases not arising under the Constitution and laws of the general government, the laws of the several states may properly be regarded by each other as foreign laws But we apprehend that an entirely different rule prevails in all cases where a right is claimed under the Constitution or laws of the Union."

The judicial proceeding must be certified and proved, but the system of jurisprudence and the local law from which it came will be judicially recognized.

In Caperton *vs.* Ballard, 14 Wallace 238, cited by the defendant in error (Brief, page 10), the court refused to give effect to the judicial proceeding, because it was not certified under the Act of 1790. There was no question as to the force and effect of that proceeding under the laws of the State from which it came.

2d. So the courts of the several States will take notice of the statutes of the sister States when the operation of such statutes is invoked, touching transactions governed by them. This is pre-eminently so in Pennsylvania.

The case of Bock *vs* Lauman, 24 Pa. St. Rep. 435, is on all fours with this case. The very same statute of New York was involved, and no plea or proof of the statute had been made. The court say (p. 445), "the rule of international law, shortly expressed in the maxim *locus regit actum*, is a part of our law. That rule acquired an increase of sanction by the union of the states: it is involved in the constitutional declaration that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; it receives at least, a partial expression in the Judiciary Act of 1789, declaring that the laws of the several states shall be taken as rules of decision in the United States Courts, and many clauses of the constitution cannot have their full effect as laws, unless we do take judicial notice of the institutions of sister states." (And on p. 446), "practically, with us (in Pennsylvania), the statutes of a sister state can scarcely be considered as matter of fact, for our courts take notice of them on

simple presentation and give full faith and credit to them as public acts."

In State of Ohio *vs.* Hinchman, 27 Pa. St. Rep. 479, it was held that where a question arises under that part of the constitution of the United States, and the Act of Congress, which requires full faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state, our (Penna.) courts will take notice *ex officio* of the local laws of the state from which the record comes. And the court says, "A judgment of this court adverse to the right arising out of the federal constitution and legislation, would be reviewable in the Supreme Court of the United States, and there the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration, for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another: and hence it follows, that in questions of this sort, we should take notice of the local laws of a sister state in the same manner as the Supreme Court of the United States would do on a writ of error to our judgment: 7 Cranch 408, 481, 3 Wheat. 234."

This view of the learned court, it is submitted, is also sustained by the 25th section of the Judiciary Act itself, which provides that a final judgment in any suit in the highest court of a state, involving a federal question, may be re-examined, &c., in the Supreme Court of the United States upon a writ of error, "and the *writ shall have the same effect*, as if the judgment complained of had been rendered or passed in a circuit

court." On a writ of error to a circuit court this court would take judicial notice, if need be, of a statute of New York, and if this writ to the state court "shall have the same effect," it will require that judicial cognizance likewise be had here of the New York statute.

In Bennett *vs.* Cadwell, 20 P. F. Smith 257, 258 (Penna.), cited in the "opinion," the question was as to the unwritten, or common law of another state. The Act of Congress gives to the "acts, records and judicial proceedings" only, of other states, full faith and credit, but not to their unwritten law.

IV. In the argument of defendant in error (p. 10), stress is laid on the fact that the affidavit of defence "*suggested*" merely that the notes were usurious and void, under the statute of New York In point of fact, all of the suggestions and statements of the affidavit are covered by the averment of its last clause (p. 5), which reads, "*All of which facts*, the defendant is advised, informed and believes *to be true*," &c.

But accepting the criticism, how evanescent the objection becomes in the light of the above enumerated authorities! The courts of Pennsylvania take official notice of the acts of other states, so it was not necessary either to aver or suggest to the court what the statutes or decisions of New York were.

It would have been an impertinence in the defendant below, with his hand on holy book, and on his corporal oath, to have declared the law of New York to the court, whose province it was to judicially know and pronounce the same in a federal case.

Said an old Justice of the King's Bench: "God forbid that even a Judge should be required to know all the law." It became a layman then not rashly to

presume to know any of it, much less under the pains of perjury to pronounce it. The defendant therefore discretely "suggests" only, to the court, that which is adjudged to lie in the breast of the court in Pennsylvania in such a case, namely: their official knowledge of the statutes of the sister states.

The draftsman who framed the affidavit of defence, for these reasons, and in accordance with the well-settled practice in Pennsylvania, stated the "facts" in the affidavit as averments, and the "law" as a suggestion, having before him a line of decisions unbroken in Pennsylvania for 30 years, that where a federal question is involved, the court will take cognizance of the local laws of the other states.

If it be said that this contravenes the "opinion," the answer is, that the "opinion" is no part of the record, and is not before the court, but that the judicial decisions of Pennsylvania are.

Should this court reverse, then the cause merely goes back to the subordinate court in Pennsylvania for trial before a jury, where the facts of the case on both sides can be ascertained, and entire justice be done between the parties.

THOS. GREENBANK,

Atty. for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED

Supreme Court of the United States.

ON WRIT OF ERROR TO SUPREME COURT OF PENNSYLVANIA.

JOHN W. BOUGHTON,
PLAINTIFF IN ERROR,

vs.

AMERICAN EXCHANGE NATIONAL BANK,
DEFENDANT IN ERROR.

Sur MOTION TO DISMISS WRIT OF ERROR.

Brief of Defendant in Error.

W. W. MONTGOMERY,
SAMUEL WAGNER,
Of Counsel with Defendant in Error.

PHILADELPHIA:
ALLEN, LANE & SCOTT, PRINTERS, 229-231 SOUTH FIFTH STREET.
1881.

Supreme Court of the United States.

JOHN W. BOUGHTON, Plaintiff in Error, *vs.* AMERICAN EXCHANGE NATIONAL BANK, Defendant in Error.	On Writ of Error to the Supreme Court of Pennsylvania.

MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

STATEMENT OF THE CASE.

This case was a suit brought May 1st, 1879, in the Court of Common Pleas, No. 3, of Philadelphia, by the American Exchange National Bank, against John W. Boughton, upon the following promissory notes:—

PHILADELPHIA, June 15th, 1878.

$203.

Four months after date, I promise to pay to the order of E. L. Hussey, two hundred and three dollars, at S. S. Harris', 658 Broadway, New York, without defalcation, value received.

JOHN W. BOUGHTON.

Endorsed:

E. L. HUSSEY,
SAMUEL S. HARRIS.

PHILADELPHIA, June 21st, 1878.

$250.

Four months after date, I promise to pay to the order of E. L. Hussey, two hundred and fifty dollars, at S. S. Harris', 658 Broadway, New York, without defalcation, value received.

JOHN W. BOUGHTON.

Endorsed:

E. L. HUSSEY,
J. B. KELTZ.

AFFIDAVIT OF DEFENCE.

CITY AND COUNTY OF PHILADELPHIA, *ss.*:

John W. Boughton, being duly sworn, says:—

He has a just and legal defence to the plaintiffs' claim in the above cause, as follows:—

That the two notes, copies of which are filed in this case, were delivered to the payee Hussey, doing business in New York, and by him there endorsed. That they were executed by the defendant, and delivered to the said Hussey in New York simply as a matter of accommodation to said Hussey, and for the purpose of renewing two preceding accommodation notes given to said Hussey, and in the hands of Samuel S. Harris, banker, at 658 Broadway, New York. That the said Hussey, on receiving the two notes now sued upon and before the maturity of the same, delivered them to said Harris in New York City in renewal of the two preceding notes, and paid him therefor legal interest at seven per cent., and the further sum of twenty-five dollars on each of said notes as usurious interest.

The defendant suggests to the court that under the statute of New York, and the decisions thereon, the said notes

are usurious, and void even in the hands of third persons.

And the defendant, in order to give a more detailed statement of the whole transaction, further says that the indebtedness on said notes originated as follows:—

In March, 1877, the said E. L. Hussey, of New York, payee of said notes, being desirous to borrow money, obtained in New York from the defendant his (the defendant's) accommodation note for $495.58, dated March 20th, 1877, for three months, to the order of said Hussey. The said note was executed by the defendant without any consideration and not in any business transaction between himself and Hussey, but simply as a matter of accommodation to said Hussey and to raise money for his benefit.

That on March 23d, 1877, said Hussey delivered said note to Samuel Harris, banker, 658 Broadway, New York, who, with J. B. Keltz, his partner, there discounted the same and charged therefor for the loan, the sum of thirty-three dollars and seventy-seven cents, being twenty-five dollars more than legal interest.

That said note matured June 23d, 1877, and was renewed by the said Hussey, delivering to the said Harris at his office in New York, on June 21st, 1877, the defendant's accommodation note to the order of said Hussey for $490, at three months, and paying the said Harris for said renewal thirty-three dollars and eighty-six cents interest, and five dollars and fifty-eight cents on account of the debt.

That in order to renew said last note of $490, said Hussey delivered to said Harris, at his office in New York, on September 20th, 1877, the defendant's accommodation note for $490, at three months, and paid for said renewal the sum of thirty-three dollars and sixty-seven cents.

That in like manner said last-mentioned note was renewed by said Hussey delivering to Harris the defendant's accommodation note to Hussey, made for $490, at

three months, on December 19th, 1877, and paying for said renewed loan thirty-three dollars and forty-six cents.

Which last note was also renewed by Hussey delivering to said Harris the defendant's accommodation note to the order of Hussey, for $490, dated March 19th, 1878, at three months, and paying for the renewed loan thirty-three dollars and sixty-five cents.

This note was also renewed by Hussey delivering to Harris, in New York, on June 22d, 1878, two of the defendant's accommodation notes, one dated June 21st, 1878, at three months, for $240, and the other being one of the notes now sued on, dated June 21st, 1878, for $250, at four months, and paying for the renewed loan thirty-five dollars and twenty-eight cents.

All of these transactions were in the city of New York, and the different sums paid for the renewal of the notes and of the loan were made up of legal interest at the rate of seven per cent., and the sum of twenty-five dollars in each case as usurious interest. That said notes were all for the sole benefit and accommodation of said Hussey, and in no way based on any business transaction with the defendants.

That the said Samuel S. Harris and J. B. Keltz, endorsers on the two notes respectively, were partners in the discounting of said notes and making said loans.

The defendant further says that the note for $203 originated as follows:—

In 1877, the said Hussey, in New York, obtained from the defendant his (the defendant's) accommodation note, for $410, to the order of said Hussey, at three months, upon which the said Harris and Keltz, partners, in New York, loaned to Hussey the sum of $410, deducting as interest thirty-two dollars and eighteen cents, which said note was renewed in like manner as the above-mentioned renewals by said Hussey delivering to said Harris the defendant's accommodation notes to the order of Hussey.

On July 2d, 1877, and paying for the renewal.				$32.33
On October 3d, 1877,	"	"	"	32.12
On January 4th, 1878,	"	"	"	31.97
On April 4th, 1878,	"	"	"	31.95

On July 3d, 1878, by delivering to said Harris two of the defendant's accommodation notes, one for $203, dated June 15th, 1878, the note now sued on, and one for $195, dated July 3d, 1878, each to the order of Hussey, on which last renewal the said Hussey paid said Harris thirty-two dollars as interest.

That all the said transactions were in the city of New York, and that the said sums paid in the said several renewals consisted in each case of the legal rate of interest in New York, at seven per cent. and the sum of twenty-five dollars as usurious interest.

That the defendant had no business transaction with the said Hussey on which said notes were based; that the same were without consideration, and solely for the accommodation of the said Hussey, and given to raise money for his benefit, and not in the course of business.

All of which facts the defendant is advised, informed, and believes to be true, and expects to prove on the trial of the cause in court.

JOHN W. BOUGHTON.

Sworn and subscribed before me, the twenty-third day of May, A. D. 1879.

JOHN BELL,
[SEAL] *Notary Public.*

Upon motion, and after argument by counsel, the court entered judgment against the defendant for want of a sufficient affidavit of defence.

The case came before the Supreme Court of Pennsylvania upon writ of error to the Court of Common Pleas of

Philadelphia, and, after argument by counsel, the judgment of the court below was affirmed in the following opinion:—

OPINION.

Boughton vs. *American Exchange National Bank.*	Error to the Court of Common Pleas, No. 3, Philadelphia.

GREEN, J.—The defendant in this case claims that although the notes in suit are dated at Philadelphia, they are payable in New York; and he argues that they are to be governed by the law of New York. He further contends that by the law of that State such securities as these, although on the face they purport to be ordinary business paper, may be shown to be accommodation paper, and, such being the fact, that they are void by the statute law of New York, as interpreted by the courts of that State. He argues that this consequence follows even as against innocent third persons who take them in the regular course of business before maturity for full value, actually paid, and without notice of any taint, if, in point of fact, as between the original parties, they were in any manner affected with usury. It is needless to say that in this Commonwealth such a defence would not be listened to in any court of justice, if the transaction were a Pennsylvania contract. Of course, in order to maintain such a defence in our courts, upon the ground that it is a good defence by the law of New York, it is absolutely essential, in an affidavit of defence, to aver, and, on the trial, to prove by competent testimony that the law of New York is in accordance with the contention. The question, what is the law of another country or State,

when that law is set up in a litigated cause, is a pure question of fact. The established doctrine now is that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. Story's Confl. of Laws, section 637; see, also, 1 Whart. Law of Ev., section 300, and sections 304 to 312, inclusive, as to the necessity and kind of proof required in such cases. *Ripple* vs. *Ripple*, 1 Rawle, 386. The laws of another State of the Union are to be proved as the laws of a foreign country. It is well settled that in the absence of proof, the law of the State where the contract was made will be presumed to be the same as the *lex fori*. 20 P. F. Smith, 257, 258, and cases cited.

The defence in the present case is brought before us in an affidavit of defence. The only averment in the affidavit upon this subject, is in the following words:—"The defendant suggests to the court, that under the statute of New York, and the decisions thereon, the said notes are usurious, and void even in the hands of third persons." If this mode of stating facts were to be used as to any ordinary matter of fact, it would not be tolerated as a sufficient statement.

The averment under consideration is, at the best, a mere suggestion, and not an assertion of anything. Even if it were an assertion, it should be very much more specific than it is. No statute is quoted either in words or by any statement of its substance. No decisions of any courts are described or even referred to as establishing any particular rule of law. It is very certain that no statute and no decisions of New York ever declared "that the said notes are usurious, and void even in the hands of third persons." And yet this is the whole of the averment. It can not be anything more than the opinion of the affiants, that under some statute of New York, and the decisions thereunder, the particular notes upon which this suit is founded are void.

But this is altogether inadequate.

In *Peck* vs. *Jones*, 20 P. F. Smith, 83, we held that an affidavit of defence should aver distinctly every fact necessary to constitute a defence. Nothing should be left to inference. There are many other cases to the same effect. An affidavit of defence should state specifically and at length the nature and character of the defence relied on, and should set forth such facts as will warrant the legal inference of a full and legal defence to the plaintiff's cause of action. *Bryan* vs. *Harrison*, 1 Wr., 223; *Woods* vs. *Watkins*, 4 Wr., 458.

How could the court below, or how can we, determine from the *facts* set out in this affidavit whether "the said rates are usurious, and void even in the hands of third persons"? We are asked to make a solemn decree to that effect; but upon what information on which we can be permitted to found such a judgment? Absolutely none.

It is too plain for argument, that no indictment for perjury could be maintained for the falsity of the averment we are considering. It alleges no fact, and the opinion which it expresses may, for aught else contained in the affidavit, be entirely erroneous. The affidavit of defence is insufficient, and the court was right in entering judgment for the plaintiff. The excessive payments made by Hussey, the payee, to Harris, the bill-broker, constitute no defence in favor of the maker, Boughton, against the plaintiff, an innocent holder.

Judgment affirmed.

John W. Boughton, Plaintiff in Error, vs. *American Exchange National Bank, Defendant in Error.*	Supreme Court of U. S. October Term, 1881. No. .

And now, 30th March, 1881, the Defendant in Error, by its counsel, Samuel Wagner, Esq, moves the court to dismiss the writ of error in this case for want of jurisdiction.

ARGUMENT OF DEFENDANT IN ERROR.

This does not present a case within the twenty-fifth section of the Judiciary Act. If it be claimed that any right, privilege, or immunity is claimed under the Constitution, and the decision is against such right, privilege, or immunity, it is sufficient to say that this *clause of* the Judiciary Act relates to the second section of Art. IV of the Constitution, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and that this provision of the Constitution is confined to those privileges and immunities which are, in their nature, *fundamental*, such as belong to the citizens of all free governments. The Supreme Court of the United States has expressly decided that it does not extend to the privileges conferred by the local laws of a State. In giving the opinion of the Court in *Connor* vs. *Elliott*, 18 Howard, 591, Mr. Justice Curtis said :—" Rights attached by the law to contracts, by reason of the place where such contracts are made and executed, wholly irrespective of the citizenship of the parties to those contracts, can not be deemed 'privileges of a citizen' within the meaning of the Constitution."

If it be claimed that the judgment of the Supreme Court of Pennsylvania impugns the provision of the Constitution and Act of Congress that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, the answer

is that there is here no record of any public act or judicial proceedings of another State brought before the court in the manner prescribed by law. In *Caperton* vs. *Ballard*, 14 Wallace, 238, it was expressly decided that to confer jurisdiction on the ground that the State court refused to give proper effect to a judicial record of another State it must appear that it was certified under the Act of 1790.

But even if it should appear that a constitutional question did arise in the case, it is very clear that the Supreme Court of Pennsylvania did not pass upon such question, but rested its decision wholly upon the ground that the defendant in the court below failed to set out a good defense in the way prescribed by the laws of that State and the practice of its courts. The question of the bearing of the statute or decisions of New York as to usury did not arise in such shape that it could be passed upon, for the record showed that the law of New York as to usurious contracts was not before the court, inasmuch as the affidavit of defense contained no statement of it, but merely a *suggestion* that the notes were usurious and void under the statute of New York and the decisions thereon. It is unnecessary to enter upon any extended account of the practice of entering judgment for want of a sufficient affidavit of defense. It is, in some respects, almost peculiar to Pennsylvania. Originating in a practice agreed upon and adopted by the Bar for convenience merely, it became, in time, the subject of statutory enactment, as a system which had been found by long usage to be best adapted to secure the prompt and efficient administration of justice in a very large class of cases of almost daily occurrence. It is very natural and reasonable, therefore, that such a system of practice should be governed by very strict rules; and the authorities cited by Mr. Justice Green in the opinion of the court, show how few and simple these rules are, and how clearly they have been laid down by the Supreme Court of that State. Undoubtedly the power to establish these rules rests wholly with the State courts, and no constitutional question can arise when there has been a failure

to interpose properly the law of another State as matter of defence, any more than in a case of failure to set out in the proper way any other fact upon which the defendant might rely. In neither case can he invoke the aid of the Supreme Court of the United States to relieve him from the consequences of his failure to act up to the laws of his own State, and the settled practice of its courts.

Even if the case had presented a constitutional question, and that question had been passed upon by the State Court in addition to that upon which it rested its judgment, still the case would have no place in this court, for in *Rector* vs. *Ashley*, 6 Wallace, 142, it was held that if, in addition to the decision of the State Court on a question within the twenty-fifth section of the Judiciary Act, that court has rested its judgment on some point in the case not within the provision of that section, and that point is broad enough to sustain the judgment, then, although the ruling of the State court might be reversed on the point which is of Federal cognizance, the court will not entertain jurisdiction of the case

In the case of *The Victory*, 6 Wallace, 382, it was held that it must appear that one of the questions mentioned in the twenty-fifth section of the Judiciary Act was raised in the State court, and *actually decided by it;* that it was not sufficient that the Supreme Court could see that it *ought* to have been raised, and that it might have been decided. And in *Hamilton Company* vs. *Massachusetts*, 6 Wallace, 632, it was said that it is not sufficient that such a question might have arisen, unless it appears that it did arise, and was applied by the State court in disposing of the controversy. In *Parmalee* vs. *Lawrence*, 11 Wallace, 36, it was decided that the conflict of the State law with the Constitution of the United States, and the decision of the State court in favor of its validity, must appear on the face of the record; and the question must have been necessarily involved in the decision, so that the State court could

not have given judgment without deciding it. And the Chief Justice, in giving the opinion of the court in the recent case of *Brown* vs. *Atwell*, 2 Otto, 329, referring to *Parmalee* vs. *Lawrence*, and the earlier cases, says :—" We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to the court for decision. It must appear that its decision was necessary to the determination of the cause."

W. W. MONTGOMERY,
SAMUEL WAGNER,
Of Counsel with Defendant in Error.

Submitted 18th Nov. 4 to 3

14-428

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~344.~~ 98

SAMUEL NESLIN, IMPLEADED WITH CHARLES F. SMITH, APPELLANT,

vs.

WELLS, FARGO & COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED NOVEMBER 23, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 344.

SAMUEL NESLIN, IMPLEADED WITH CHARLES F. SMITH, APPELLANT,

vs.

WELLS, FARGO & COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a Be it remembered that on the 14th day of January, A. D. 1878, there was filed in the office of the clerk of the supreme court of the Territory of Utah, a transcript of the record and proceedings in and of the district court of the third judicial district of said Territory, in a certain cause theretofore therein pending in which Wells, Fargo & Co. was plaintiff and Charles F. Smith and Samuel Neslin were defendants, of which said transcript the following is a copy, to wit:

b In the supreme court of the Territory of Utah.

On appeal from third district court.

WELLS, FARGO & CO., RESPONDENT,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, APPELLANT.

RECORD ON APPEAL.

Sutherland & Kimball, attorneys for appellant.
Marshall & Royle, attorneys for respondent.

Complaint.

1 In the supreme court of the Territory of Utah.

On appeal from third district court.

WELLS, FARGO & CO. (A CORPORATION), plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, defendants.

Transcript of records on appeal.

Samuel Neslin, appellant.

Plaintiff complains and alleges, that at the dates hereinafter mentioned plaintiff was and now is a corporation under and by virtue of the laws of the Territory of Colorado;

That on September 27th, A. D. 1873, the defendant, Charles
2 F. Smith, at Salt Lake City, Territory of Utah, made his promissory, negotiable note, bearing date on that day in the words and figures following, to wit:

$13,000.00.] SALT LAKE CITY, *Sept. 27th*, 1873.

Sixty days after date, for value received, I promise to pay to the order of Jno. W. Kerr, thirteen thousand dollars, negotiable and payable at the banking house of T. F. Tracy & Co., in Salt Lake City, without "defalcation or discount, with one and one-half per cent. interest per month, from date until paid, both before and after judgment."

(Signed) CHARLES F. SMITH.

That the said defendant, Chas. F. Smith, to secure the payment of the said principal sum and interest thereon, as mentioned in said note according to the tenor thereof, did execute under his hand and seal, and

delivered to the said John W. Kerr, a certain mortgage, bearing date the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-three, and conditioned for the payment of the said sum of thirteen thousand dollars, and interest thereon, at the rate and at the terms and in the manner specified in said note, and according to the condition thereof; which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 6th day of October, A. D. 1873, duly recorded in the office of the county recorder of the county of Salt Lake, in book of mortgages D, page 546, a copy of which said mortgage, with the endorsements thereon, is hereunto annexed, marked Exhibit A, and made part of this complaint.

That thereafter and before the maturity of said note, the said John W. Kerr, the payee therein, indorsed the said note, and for value assigned, transferred and delivered the same to the plaintiff herein, who is now the legal holder and owner of said note and of the mortgage aforesaid.

That the principal sum mentioned in said promissory note and mortgage, together with interest thereon, at the rate of one and one-half per cent. per month, from the 27th day of September, 1873, has not been paid by said defendant, or any part thereof.

That the defendant, Samuel Neslin, have, or claims to have
3 some interest or claim upon said premises, or some part thereof, as mortgagee or otherwise, which interest or claim is subsequent to, and subject to the lien of the plaintiff's mortgage.

Wherefore, the plaintiff prays judgment against the said defendant.

First. Against the said Charles F. Smith, for the sum of thirteen thousand dollars, with interest, at the rate of one and one-half per cent. per month, from the 27th day of September, A. D. 1873, and for costs of suit.

Second. That the usual decree may be made for the sale of said premises, by the sheriff of said county, according to law and the practice of the court, that the proceeds of said sale may be applied as payment of the amount due to the plaintiff, and that said defendants and all persons claiming under them, subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers or otherwise, may be barred and foreclosed of all rights, claims or equity of redemption in the said premises, and any part thereof, and that the said plaintiff may have judgment and execution against the said defendant, Charles F. Smith, for any deficiency which may remain after applying all the proceeds of the sale of said premises, properly applicable to the satisfaction of said judgment.

Third. That the plaintiff or any other parties to the suit may become purchaser at said sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the sheriff's deed therefor, and that the plaintiff may have such other or further relief in the premises as to this court may seem meet and proper.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

Affidavit of J. L. Browne.

TERRITORY OF UTAH.
County of Salt Lake, ss:

Jacob L. Browne, being first duly sworn, on his oath says,
4 the plaintiff herein is a corporation, whose principal offices an

office is in San Francisco, California; I, this affiant, am the cashier of the plaintiff in the city of Salt Lake, and as such officer thereof, and and in such capacity and personally acquainted with the facts in the complaint set forth; that I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters, I believe it to be true.

J. L. BROWNE.

Subscribed and sworn to before me this 22d day of April, 1874.

JOS. F. NOUNNAN, *Clerk.*

Filed April 22d, 1874.

JOS. F. NOUNNAN, *Clerk.*

Summons.

WELLS, FARGO & CO. (A CORPORATION), PLAINTIFF,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, DEFENDANTS.

To people of the Territory of Utah send greeting to Charles F. Smith and Samuel Neslin, defendants:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

5 The said action is brought to recover the sum of $13,000.00, with interest thereon, from the 27th day of September, 1873, at the rate of one and one-half per cent. per month, and costs of suit, alleged to be due from defendants to plaintiff, on a certain promissory note, dated September 27th, 1873, payable 60 days after date, and for the foreclosure of a certain mortgage, executed by defendant, Smith, September 27th, 1873, to secure the said note, all of which is set out more fully in the complaint on file herein. And you are hereby notified, that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. James B. McKean, Judge, and the seal of the district court of the third judicial district, in and for the Territory of Utah, this 24th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JOS. F. NOUNNAN, *Clerk.*

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within summons on the 24th day of April, A. D. 1874, and personally served the same on the 28th day of April, 1874, on Charles F. Smith, being the defendant named in said summons, by delivering to said defendant, personally, in the city and

county of Salt Lake, Territory aforesaid, a copy of said summons and a certified copy of complaint attached to said copy of said summons.

R. T. BURTON *Sheriff.*
By A. DEWEY, *Deputy.*

Sheriff's fees and mileage, $2.50.

MARSHALL & BOYLE,
Plaintiff's Attorneys.

Filed on return, May 9th, 1874.

JOS. F. NOUNNAN, *Clerk.*

6 In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO., (A CORPORATION), PLAINTIFF,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, DEFENDANTS.

And now come the said Samuel Neslin, one of the above-named defendants, by James N. Kimball, his attorney, and said plaintiff, by Marshall & Royle, its attorneys; and it is hereby stipulated and agreed that said defendant, Samuel Neslin, shall have until the 15th day of May, 1874, to answer the above complaint.

MARSHALL & ROYLE,
Attorneys for Plaintiff.
JAMES N. KIMBALL
Attorney for Defendant Neslin

Filed April 30th, 1874.

Answer and cross complaint of defendant Samuel Neslin.

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO., (A CORPORATION), PLAINTIFF,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, DEFENDANTS.

Comes now Samuel Neslin, one of said defendants, and for his separate answer to the plaintiff's them complaint herein alleges:

7 First. That he admits, upon information and belief, that the plaintiff is a corporation, as stated in said complaint.

Second. And for further answer, upon information and belief, he admits the making and execution of the plaintiff's note and mortgage, at the time they bear date, but he avers, upon information and belief, that prior to the date of said note and mortgage, said payee and mortgagee therein had become endorser and surety for the defendant, Charles F. Smith, to said plaintiff in a large sum of money, the true amount of which indebtedness is unknown to this defendant, and that the note and said mortgage, upon which this action is brought, were made, executed, and delivered to the said John W. Kerr, the payee and mortgagee therein, to indemnify and secure him against the payment as such endorser and surety of said defendant Smith's aforesaid indebtedness to

said plaintiff, and without other consideration, and for no other purpose, and that said Smith's said indebtedness is still outstanding, wholly unpaid and wholly unsatisfied.

Third. And for further answer, upon information and belief, he denies that said Kerr, said payee and said mortgagee, in said plaintiff's note and mortgage, transferred the same for value; and this defendant avers that said Kerr, said payee and mortgagee, transferred said note and mortgage to said plaintiff as collateral to said Kerr's liability to said plaintiff on said Smith's aforesaid indebtedness, and in no other way, and for no other purpose, all of which facts and matters were well known to said plaintiff, its agents, and attorneys, at the time of said transfer.

Fourth. The defendant, for a further answer, admits that the plaintiff's said mortgage was recorded on the 6th day of October, 1873, the date alleged in said complaint, but he avers, upon information and belief, that said John W. Kerr, said mortgagee, and said plaintiff, its agents and attorneys, for a long time prior, and at the time of the execution of said plaintiff's note and mortgage had notice that said defendant Smith had executed and delivered to this defendant a note for the sum of seven thousand dollars ($7,000), to secure the payment of a part of the purchase and consideration money for the same premises described in said complaint, and that said Kerr and said plaintiff, its agents and attorneys, at the time last aforesaid, also had notice that said Smith had also executed a mortgage to this defendant to
8 secure the payment of said note, covering the aforesaid premises, in the sum of seven thousand dollars, with one and one-half per cent. per month interest, from March 1st, 1873, with not to exceed three per cent. for counsel and attorneys' fees for collecting and foreclosing said mortgage, and all taxes and expenses against said property. A copy of which note and mortgage is herewith filed and made a part of this answer.

And that at the time of the execution and recording of said plaintiff's mortgage, said Kerr, said payee and mortgagee, and said plaintiff, its agents and attorneys, had notice that the defendant's said note and mortgage were unsatisfied and wholly unpaid.

Fifth. And for further answer, upon information and belief, he avers that prior to and at the time of the execution of said plaintiff's note and mortgage, it was agreed by and between said Smith and said Kerr, said payee and mortgagee, that the defendant's mortgage should be recorded in the office of the recorder of Salt Lake County, first in time, and that both mortgages were recorded in the office of the recorder of said county, on the 6th day of October, 1873, in book "D" of the records, on pages 546, 547, 548, 549, and 550.

Sixth. And for a further answer, this defendant avers, upon information and belief, that prior to, and at the time of said alleged transfer of said plaintiff's mortgage to the plaintiff, the plaintiff and its agents had full knowledge of the making and execution and delivering of the defendant's note and mortgage, and for the purposes hereinbefore alleged.

Seventh. For a further answer, this defendant denies that the mortgage described in plaintiff's complaint is a prior lien to this defendant's mortgage. Wherefore he prays judgment.

Eighth. This defendant, Samuel Neslin, for further answer, and by way of cross-complaint against said defendant, Charles F. Smith and Wells, Fargo & Company, plaintiff, alleges: That on the 27th day of November, A. D. 1872, said defendant Smith made his certain negotiable promissory note to this defendant, dated on that day, by which he

promised to pay this defendant, or his order, the sum of seven thousand
dollars ($7,000) one year after said date, which said sum was the
9 unpaid purchase money for the property hereinafter described,
and that said promissory note was negotiable and payable at the banking house of Wells, Fargo & Company, in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month from the first day of March, 1873, until paid, both before and after judgment, a copy of which note is filed herewith and made a part hereof, marked Exhibit B.

That thereupon said defendant duly made, under his own hand and seal, a mortgage to this defendant, of even date with said note, to secure the payment of said note and interest as it should become due and payable, and not to exceed three per cent. for attorney and counsel fees, and that by said mortgage, said defendant granted, bargained and sold, conveyed and confirmed, to this defendant, his heirs and assigns, the following described premises:

That certain lot of land situate, lying, and being in Salt Lake City, in the county of Salt Lake, and Territory of Utah, and known and described as lot number two (2), in block number thirteen (13), plat D, in the Salt Lake City survey, the said lot being situated on the corner of South Temple street and Walnut street, in Salt Lake City; which mortgage was upon the condition, in substance, that if the said defendant should well and truly pay, or cause to be paid, the said promissory note, with interest thereon according to the tenor thereof, then, in such case, the said mortgage and the estate thereby granted should be null and void; else to remain in full force and virtue; a copy of which mortgage is filed herewith and made a part hereof, marked Exhibit C.

That said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was, on the 6th day of October, A. D. 1873, duly recorded in the office of the recorder of the county of Salt Lake, in book of mortgages D, pages 548, 549, and 550.

That the principal sum mentioned in said promissory note and mortgage, with the interest thereon, at the rate specified therein, from the first day of September, 1873, was long since and still is due, and remains wholly unpaid.

That the attorney and counsel fees for foreclosing the aforesaid mortgage are reasonably worth three per cent. on the sum due on said note
and mortgage.
10 That said plaintiff, Wells, Fargo & Company, has, or claims to
have, some interest in, or lien on, said mortgaged premises, accrued since, and subject to the lien of this defendant's said mortgage.

Werefore this defendant prays summons against said defendant Charles F. Smith, and plaintiff Wells, Fargo & Company, requiring them to appear and answer this cross complaint.

And he prays judgment against said parties:

First. Against the said Charles F. Smith for the sum of seven thousand dollars ($7,000), with interest at the rate of one and one-half ($1\frac{1}{2}$) per cent. per month, from the first day of September, A. D. 1873; three (3) per cent. for counsel and attorneys' fees and costs of suit.

Second. That the usual decree may be made for the sale of said premises by the sheriff of said county, according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due this defendant; that said plaintiff and cross-defendant, Wells, Fargo & Company, and said defendant Charles F. Smith, and all parties claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, encumbrancers, or other-

wise, may be barred and forever foreclosed of all rights or equity of redemption in the said premises, and every part thereof; and that this defendant and cross-complainant, Samuel Neslin, may have judgment and execution against the said Charles F. Smith for any deficiency which may remain after applying all the proceeds of the sale of the said mortgaged premises and property applicable to the satisfaction of said judgment.

Third. That this defendant and cross-complainant, or any other parties to this suit, may become purchasers at this sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises, on production of the sheriff's deed therefor, and that this defendant and cross-complainant may have such other and further relief in the premises as to this court may seem meet and proper.

JAMES N. KIMBALL AND
D. P. WHEDON,
Attorneys for Defendant Neslin.

11 *Affidavit of Samuel Neslin.*

TERRITORY OF UTAH,
County of Salt Lake, ss:

Samuel Neslin being duly sworn, on his oath says, that he has heard read the foregoing answer and cross-complaint and knows the contents thereof, and that the same are true, of his own knowledge, except those matters stated therein on information and belief, and as to those matters he believes them to be true.

SAMUEL NESLIN.

Subscribed and sworn to before me this 5th day of May, 1874.
JOS. F. NOUNNAN, *Clerk.*

Copy hereof served on us May 5th, A. D. 1874.
MARSHALL & ROYLE,
Attorneys for Plaintiff.

Issued May 6th, 1874.
Filed May 5th, 1874.

JOS. F. NOUNNAN, *Clerk.*

Summons.

WELLS, FARGO & CO. (A CORPORATION), plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, defendants.

To people of the Territory of Utah send greeting: To Charles F. Smith and Samuel Neslin, defendants:

12 You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county;

or, if served out of this county, but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $7,000, with interest, at 1½ per cent. per month, from September 1st, 1873, and 3 per cent. for counsel and attorney's fees, and for costs of suit, alleged to be due from defendant Smith to defendant Neslin on a certain promissory note, dated November 27th, 1872, payable one year after date, for $7,000, and for the foreclosure of a certain mortgage, dated November 27th, 1872, executed by said Smith to said Neslin, to secure the payment of said note and interest and attorney's fees, all of which appears fully set out in the answer and cross-complaint of defendant Samuel Neslin, on file herein.

And you are hereby notified, that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. Jas. B. McKean, judge, and the seal of the district court of the third judicial district, in and for the Territory of Utah, this 6th day of May, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JOS. F. NOUNNAN, *Clerk.*

I hereby certify that I did on the sixth day of May serve the within summons, together with a certified copy of the complaint thereto attached, by delivering to the within-named Charles F. Smith. Done at Salt Lake City, Salt Lake County, Utah Territory.

13 R. T. BURTON, *Sheriff*,
By B. J. GOLDRY, *Deputy.*

Filed on return, May 9th, 1874.

JOS. F. NOUNNAN, *Clerk.*

EXHIBIT A.

This indenture, made the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-three, between Charles E. Smith, of Salt Lake City, in the county of Salt Lake and Territory of Utah, the party of the first part, and John W. Kerr, of the city, county, and Territory aforesaid, the party of the second part, witnesseth:

That the said party of the first part is justly indebted to the said party of the second part in the sum of thirteen thousand dollars, lawful money of the United States of America, upon a certain promissory note, made at the date hereof, by the said party of the first part to the said party of the second part, in the words and figures following, to wit:

$13,000.00.] SALT LAKE CITY,
September 27th, 1873.

Sixty days after date, for value received, I promise to pay to the order of John W. Kerr thirteen thousand dollars, negotiable and payable at the banking-house of T. F. Tracy & Co., in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month from date until paid, both before and after judgment.

(Signed) CHAS. F. SMITH.

Now this indenture witnesseth, that for the purpose of securing the payment of the said promissory note and the interest thereon as it shall be-

come due and payable, the said party of the first part, for and in consideration of the premises, as also in the consideration of the sum of one
14 dollar lawful money to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and does hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, all that certain lot, piece or parcel of land situate lying and being in Salt Lake City, in the county of Salt Lake and Territory of Utah, described as follows, to wit: being lot number two (2), in block number thirteen (13), plat D, of the Salt Lake City survey; the said lot being situated on the corner of South Temple street and Walnut street, in Salt Lake City, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

To have and to hold the said premises, with all the tenements, hereditaments and appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns, forever:

Provided, nevertheless, that if the said party of the first part shall well and truly pay, or cause to be paid, the said promissory note, with the interest, as it shall become due and payable thereon according to the tenor and effect thereof, then, in such case, this indenture, and the estate herein granted, shall be null and void, else to remain in full force and virtue.

But it is distinctly understood and agreed, that if the interest on said promissory note, or the principal thereof, shall not be punctually paid when the same becomes due and payable, as in said promissory note mentioned, then, and in such case, the principal sum of said promissory note and the interest shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said party of the second part, his heirs, executors, administrators or assigns, for the recovery of the same, either by suit on said note or on this mortgage; anything in said note or in this indenture notwithstanding; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest on either the said note or this mortgage, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such foreclosure suit, not exceeding two per cent.
15 on the said principal sum, as well as all payments that the said party of the second part, his heirs, executors, administrators or assigns may be oblige' to make for his or their security, or on account of any taxes, charges, encumbrances, or assessments whatsoever on the said premises.

In witness whereof the said party of the first part has hereunto se his hand and seal, the day and year first above written.

[SEAL.] CHAS. F. SMITH.

Signed, sealed and delivered in presence of—
WM. CLAYTON.
(Copy.)

UNITED STATES OF AMERICA,
Territory of Utah, County of Salt Lake, ss:

On this twenty-seventh day of September, A. D. one thousand eight hundred and seventy-three, before the undersigned, a notary public,

within and for Salt Lake County, Utah Territory, duly elected, commissioned and qualified, personally appeared, Charles F. Smith, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument, as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily, and for uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. T., the day and year in this certificate first above mentioned.

[SEAL.] WM. CLAYTON,
Notary Public for Salt Lake Co., U. Ter.

Dated September 27th, 1873.

16 Filed for record September 29th, 1873, 8 a. m.

Recorded at the request of John W. Kerr, October 6th, A. D. 1873, record book D of mortgages, pages 546-7-8.

EDWIN D. WOOLLEY,
Recorder Salt Lake County, U. Ter.

EXHIBIT B.

$7,000.00.] SALT LAKE CITY, *November 27th*, 1872.

One year after date, for value received, I promise to pay to the order of Samuel Neslin, seven thousand dollars, negotiable and payable at the banking house of Wells, Fargo & Co. in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month, from the first day of March, 1873, until paid, both before and after judgment.

(Signed) CHARLES F. SMITH.

EXHIBIT C.

This indenture, made the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and seventy-two, between Charles F. Smith, of Salt Lake City, in the county of Salt Lake and Territory of Utah, the party of the first part, and Samuel Neslin, of the city, county and Territory aforesaid, the party of the second part, witnesseth:

That the said party of the first part is justly indebted to the said party of the second part in the sum of seven thousand dollars, currency of the United States of America, upon a certain promissory note, made at the date hereof by Charles F. Smith, in the words and figures following, to wit:

$7,000.00.] SALT LAKE CITY, *November 27th*, 1872.

One year after date, for value received, I promise to pay to the order of Samuel Neslin, the sum of seven thousand dollars, negotiable and payable at the banking house of Wells, Fargo & Co. in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month, from 1st of March, 1873, until paid, both before and after judgment.

(Signed) CHAS. F. SMITH.

17 Now, this indenture witnesseth that for the purpose of securing the payment of the said promissory note and the interest thereon

as it shall become due and payable, the said party of the first part, for and in consideration of the sum of one dollar lawful money, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, all that certain lot of land situate, lying, and being in Salt Lake City, in the county of Salt Lake, and Territory of Utah, as lot number two (2) in block number thirteen (13), plat "D," in the Salt Lake City survey; the said lot being situated on the corner of South Temple street and Walnut street, in Salt Lake City, together with all and singular the tenements and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises, with all the tenements, hereditaments, and appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns forever; provided, nevertheless, that if the said party of the first part shall well and truly pay, or cause to be paid, the said promissory note with the interest as it shall become due and payable thereon, according to the tenor and effect thereof, then, in such case, this indenture and the estate herein granted shall be null and void; else to remain in full force and virtue.

But it is distinctly understood and agreed, that if the interest on said promissory note, or the principal thereof, shall not be punctually paid when the same becomes due and payable, as in said promissory note mentioned, then, and in such case, the principal sum of said promissory note and the interest shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said party of the second part, his heirs, executors, administrators, or assigns, for the recovery of the same, either by suit on said note or on this mortgage, anything in said note or in this indenture notwithstanding; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest on either the said note or this mortgage, it
18 shall and may be lawful for the said party of the second part, his heirs, executors, administrators, or assigns, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such foreclosure suit, not exceeding three per cent. on the said principal sum, as well as all payments that the said party of the second part, his heirs, executors, administrators, or assigns, may be obliged to make for his or their security, or on account of any taxes, charges, encumbrances, or assessments whatsoever on the said premises.

It is further hereby distinctly understood, that in the event the said party of the first part should be unavoidably absent from Salt Lake City when the said note becomes due, the said party of the second part consents to grant an extension of ninety days for the payment of said note.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] CHAS. F. SMITH.

Signed, sealed, and delivered in presence of—
G. M. OTTINGER.
WM. CLAYTON.

UNITED STATES OF AMERICA,
Territory of Utah, County of Salt Lake, ss:

On this twenty-seventh day of November, A. D. one thousand eight hundred and seventy-two, before the undersigned, a notary public

within and for Salt Lake County, Utah Territory, duly elected, commissioned, and qualified, personally appeared Charles F. Smith, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowl-
19 edged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. T., the day and year in this certificate first above mentioned.

[SEAL.] WM. CLAYTON,
Notary Public for Salt Lake Co., U. Ter.

(Endorsed:) Charles F. Smith to Samuel Neslin, mortgage, dated November, 1872; filed for record September 29th, 1873, 12.25 p. m., recorded at the request of Samuel Neslin, October 6th, A. D. 1873, in Record Book 'D' of mortgages, pages 548–9 and 550. Edwin D. Woolley, Recorder, Salt Lake County, U. Ter. Filed November 16th, 1874. Edward B. McKean, Clerk.

At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 13th day of July, A. D. 1875.

Present, the Hon. D. P. Lowe, judge of the third judicial district.

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants.

By consent of the parties, this cause is hereby referred to E.
20 T. Sprague, esq., to take and report the evidence herein, the same to be used on the hearing of said cause before the court.

I, Edward B. McKean, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true and correct copy of an order made in the above entitled action on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and seal of said court, this fourth day of October, A. D. 1875.

[SEAL.] EDWARD B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE, *Deputy Clerk*.

Notice of intention to move for new trial.

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants.

To Messrs. MARSHALL & ROYLE and C. H. HEMPSTEAD, Esq.,
Attorneys for Plaintiff:

Please take notice, that the defendant, Samuel Neslin, intends moving the court to set aside the findings and judgment or decree heretofore

filed and entered in this action, and for a new trial and upon the following general grounds:

First. That the evidence is insufficient to justify said findings and judgment or decree.

Second. That said findings and judgment and decree are against law.

21 Third. Errors of law occurring at the trial and excepted to by the defendant Neslin, said motion will be made on a statement to be settled and filed hereafter, dated September 12th, 1876.

J. G. SUTHERLAND AND
JAMES N. KIMBALL,
Attorneys for Defendant Neslin.

Filed September 12th, 1876.

C. S. HILL, *Clerk*,
By W. P. McBRIDE, *Deputy Clerk.*

Statement on motion for new trial on part of defendant Neslin.

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants.

This is an action brought by the plaintiff to foreclose a mortgage on certain property described in the complaint herein, being all that certain lot, piece, or parcel of land situated, lying, and being in Salt Lake City, in the county of Salt Lake and Territory of Utah, described as follows, to wit, being lot number two (2) in block number thirteen (13), plat D of the Salt Lake City survey, the said lot being situated on the corner of South Temple street and Walnut street in Salt Lake City; to which complaint of the plaintiff the defendant, Samuel Neslin, answered, and by cross-complaint and by way of counter claim against the plaintiff and his co-defendant, asked a foreclosure of a certain mortgage on the same property, on the 13th day of July, A. D. 1875, by and with the consent of the attorneys of the parties hereto respectively. This 22 cause was referred to E. T. Sprague, esq., to take and report the testimony herein, the same to be used on the hearing of this cause before the court by the following order, to wit:

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants.

By consent of the parties, this cause is hereby referred to E. T. Sprague, esq., to take and report the evidence herein, the same to be used on the hearing of said cause before the court. That thereafter, on the 7th day of October, A. D. 1875, and from day to day and time to time thereafter, up to the 29th day of December, A. D. 1875, the parties appeared before said referee and produced the witnesses named in the following testimony, who were sworn and testified as follows:

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION), plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, defendants.

In pursuance of an order of said court, a copy of which is hereto attached, on the 7th day of October, A. D. 1875, appeared before me the parties to the above entitled action, viz:

Wells, Fargo & Co., by Messrs. C. H. Hempstead and Thos. Marshall, its attorneys, and Samuel Neslin, by Messrs. Sutherland and J. N. Kimball, his attorneys.

23 Plaintiffs offer in evidence the mortgage sued upon from Charles F. Smith to John W. Kerr, and also the note secured by said mortgage and sued on by plaintiffs herein, and endorsements on said mortgage and note.

Plaintiff' also offer the original notice of lis pendens, duly filed for record on the day of , in the county recorder's office of Salt Lake County, Utah Territory. Counsel for defendant Neslin objects to the introduction in evidence of the endorsements on the mortgage as irrelevant and immaterial.

JOHN W. KERR was produced as a witness for plaintiff, and, being duly sworn, testified as follows:

I am the mortgagee in the mortgage on which this suit is brought, and the payee of the note therein named, and familiar with the circumstances of the execution and delivering hereof to myself, and the transfer and delivery by me thereof to the plaintiff herein.

Question. Please state the circumstances of the execution of said note and mortgage, the consideration therefor, from you to Smith, moving.

(Counsel for defendant Neslin objects to the question on the ground that it inquires for matter not alleged in the pleadings, and, therefore, is irrelevant and immaterial.)

Answer. On or about the 5th day of July, 1873, Charles F. Smith, one of the defendants in this case, came to me in my office and asked me to endorse a promissory note to Wells, Fargo & Co., for him, amounting to some $17,000, proposing to give me a mortgage on his house and lot where he then resided, and a mortgage on a lot of cattle that he had, provided that I would so endorse for him. I asked him if his said property was clear of all incumbrance. He stated to me that it was. He likewise stated that he intended to pay on the Wells, Fargo & Co. note some six or seven thousand dollars within a few days. On his assurance to me that his property was unencumbered, and that he would execute to me a mortgage on the same, I endorsed his paper for about seventeen thousand dollars. He never paid the six or seven thousand dollars. The note I endorsed for him was dated on or about the
24 fifth day of July, 1873, was for over $17,000, I think. I endorsed the note on the day it bears date; said Smith in consideration thereof agreeing to execute within a few days a mortgage on said property. I called on him once or twice, I think, before leaving for the West, but he did not get the mortgage up for me until my return from the West; he then executed to me that mortgage, dated September 28th, 1873, securing a note for $13,000, sued on in this case. He handed

me a note of Kimball, Wines and said Smith, of, I think, $6,000, which was taken up by Smith, and represented to me that Kimball and Wines owed on said note $4,000 on joint cattle purchase. This is all the security I received pursuant to his promise, on the cattle. I went West a short time after the endorsement of the note of $17,000, as above referred to, to Wells, Fargo & Co., and returned from there about the 25th or 26th of September.

(Counsel for defendant Neslin objects to the foregoing answer, so far as it states conversations with Smith, as hearsay and incompetent; also, to the statement of the contents of the paper he calls a note to Wells, Fargo & Co., endorsed by him for Smith, as not the best evidence, and incompetent; and for the further reason that the witness has failed to answer the question fully, not having stated the consideration of the mortgage in question.)

Q. What disposition, if any, did you make of this mortgage on its receipt?

A. I took it to the recorder's office, filed it for record at 8 a. m. September 29th, 1873, had it recorded and took it within a few days to Wells, Fargo & Co. and gave it to them.

(Counsel for defendant Neslin objects to the foregoing answer so far as it states the recording of the mortgage, as not responsive to the question.)

Q. What disposition, if any, did you make of the note secured by said mortgage, and sued on herein, on its receipt by you?

A. I immediately handed it to Wells, Fargo & Co., on or about the 29th day of September, 1873, after endorsing the same.

Q. For what purpose, or for what consideration, if any, did you endorse and deliver said note to Wells, Fargo & Co.?

(Counsel for defendant Neslin objects to this question, on the ground that it calls for matters immaterial, as the question does not
25 call for any agreement between himself and Wells, Fargo & Co., expressive of the purpose, but only the operations of the witness' own mind.

A. For the purpose of assisting in liquidating the $17,000 note above referred to, and as collateral security therefor.

(Counsel for defendant Neslin object to this answer as containing a legal conclusion, but no statement of fact.)

Q. What agreement, if any, was made between you and Wells, Fargo & Co., as to disposition of the said $13,000 note, or the proceeds thereof when collected?

A. It was expressly agreed that they should have the proceeds of the said $13,000 note secured by said mortgage, and apply the proceeds arising therefrom on the $17,000 note.

(Counsel for defendant Neslin object to this answer on the same ground as the last.)

Q. Examine the note marked Exhibit B, and state, if you know, whose signature is made thereto, and whose name is endorsed thereon, and by whom said signature and by whom said endorsement were made, and state what Exhibit B is.

(Counsel for defendant Neslin object to this question as irrelevant and immaterial.)

A. The signature is that of Charles F. Smith, one of the defendants in this case; was made by said Smith; the endorsement thereon was made by myself. The paper is a promissory note, the same referred to as about $17,000 heretofore in my testimony.

The plaintiff now offer in evidence said paper, marked as Exhibit B. A copy thereof, marked Exhibit B, is hereto attached.

(Counsel for defendant Neslin object to it as irrelevant and immaterial.)

Cross-examination:

Q. Were you well acquainted with Charles F. Smith on the 5th day of July, 1873?

A. I was; had known him for about five or six years.

26 Q. Were you acquainted with his financial condition?

A. Only as he had reported to me from time to time.

Q. Has he not been insolvent since the fall of 1873?

A. I think he has been.

Q. You are a gentleman of large estate, are you not, and was at that time?

(Plaintiff's counsel object as not proper cross-examination.)

A. Reputed so.

Q. Were you not, in fact, in July, 1873, and afterwards, a man of large property?

A. I had large mining interests and a large amount of mining property of doubtful value.

Q. I ask if you were not a man of solid wealth in 1873 and afterwards?

A. As the terms, solid wealth, are used in this country, I may have been, my means consisting largely in mines and mining property, and no available money.

Q. Were you not, in September, 1873, possessed of property in such amount that an execution for $13,000 or $15,000 could have been readily collected of you, and have you not been ever since?

A. It might have been collected of me.

Q. In July, 1873, were you not a man of very careful and cautious business habits generally?

A. Generally, I think I was.

Q. At that time were you not reputed to be, and were you not, in your own opinion, one of the shrewdest business men in this community?

A. I do not know that I was so reputed, nor do I believe that I am or was one of the shrewdest business men in this community.

Witness' attention is called to Exhibit B, and he is asked:

Q. Did you, on Smith's request, endorse that note on the day
27 it bears date, without any contemporaneous security, beyond his promise to give you a mortgage, as you have stated in your examination-in-chief?

A. I did, sir. I wish to make the following explanation, why I would do it on the faith of said Smith's promise: Mr. Smith, in former years, was a clerk under me, I being cashier in a bank. I had always found him correct and truthful in all his transactions of every nature. After leaving said clerkship, on my advice, he engaged with Wells, Fargo & Co. After my leaving the cashiership of the bank, I kept the account of John W. Kerr & Co., with said Wells, Fargo & Co. I likewise was the financial agent of Gilmer and Salisbury, who also kept their banking account with said Wells, Fargo & Co.; I therefore had various and large amount of transactions with said Wells, Fargo & Co., which were trusted for the time being to the honesty and good faith of said Smith, as clerk in said institution, which always came out straight, both with myself and with reference to Gilmer and Salisbury's business, and perfectly satisfactory.

Q. State whether you were an accommodation endorser of the note marked Exhibit B, or whether you had some interest in the transaction represented by the note.

A. I was emphatically an accommodation endorser, having no interest, directly or indirectly, in the transaction.

Q. The note was made payable to you, then, simply that you might become an indorser, regularly for Smith's benefit?

A. Yes, sir.

Q. You endorsed it and delivered it to Smith?

A. Yes.

Q. Have you paid that note since, or any part of it?

A. I have not paid it or any part thereof, except turning over the $13,000 note and mortgage, above referred to, to Wells, Fargo & Co.

Q. What did you do with the cattle note?

A. I delivered that to Wells, Fargo & Co. about the same time the $13,000 note was delivered.

Q. On what account?

28 A. On the account of the $17,000 note.

Q. Was there any endorsement of payment on the cattle note?

A. My recollection is none.

Q. How much did you deposit it with Wells, Fargo & Co. for?

A. I just handed them the note and explained to them the transaction, just as I have here, to apply the proceeds on the $17,000 note [explanation]. As near as I recollect, I stated that this cattle note was taken up by said Smith and held by him against Kimball, Wines and Smith; the cattle for which this note was given had been mortgaged to Wells, Fargo & Co. by said Kimball, Wines and Smith, to secure an indebtedness of said Kimball, Wines and Smith, to Wells, Fargo & Co. which indebtedness was other than this $17,000. I stated to Wells, Fargo & Co. also, that if anything could be made out of the note or cattle transaction, it should be applied on the $17,000 note above referred to.

Q. When did you deliver the cattle note and make this explanation to Wells, Fargo & Co.?

A. I think it was about the same time that I delivered the above mentioned mortgage to them.

Q. Had you at that time delivered the $13,000 note to Wells, Fargo & Co.?

A. I do not recollect.

Q. State whether you delivered the $13,000 note and the cattle note together to Wells, Fargo & Co.

A. I do not think they were delivered at the time.

Q. With whom, as agent for Wells, Fargo & Co., did you have the conversation and make the agreement which you have mentioned, relating to the $13,000 note and the cattle note?

A. With Henry Wadsworth.

Q. Did you have more than one conversation with him, relating to the subject mentioned in the last question? If so, state how many.

29 A. If I delivered them at two separate times, I had two conversations with him.

Q. Do you remember having two conversations?

A. I think I had; for I think I delivered them at two separate times.

Q. State the date of the first conversation, and what was said by you and by Wadsworth.

A. My impression is, that the first was about the 29th of September, 1873, as near as I can recollect. On handing the $13,000 notes to said Wadsworth, I stated to him, to take this note and apply the proceeds of the same on the $17,000 note of Smith's held by them. I don't recollect the reply of Mr. Wadsworth.

Q. Did he make any reply?

A. I suppose he did; think he did; well, am not sure of it though.

Q. Have you now stated all that you can remember of that conversation?

A. Yes, sir; I have.

Q. State the date of the second conversation and what was said by you and by Mr. Wadsworth.

A. It was about the same date, as near as I can recollect; I stated that Wells, Fargo & Co. had got ahead of me in this cattle operation, as Smith had agreed at the time I endorsed his paper for said $17,000 to give me a mortgage on his interest in the cattle, to protect me on the endorsement; therefore, if anything could be made out of this cattle note or the cattle over and above their indebtedness—that of Kimball, Wines and Smith, it should be applied on said $17,000 note of Smith's to Wells, Fargo & Co., but I recognized that they had got ahead of me by the bill of sale of the cattle.

Q. State if you have now stated all that you can remember of the second conversation.

A. Yes, sir; I think that is about the substance of the second conversation.

30 Q. Did you have a third conversation with Mr. Wadsworth when you delivered the mortgage?

A. I think not; I think I just handed him the mortgage.

Q. State whether you have now related, on your cross-examination, all the conversations you had with any agents of Wells, Fargo & Co. up to and including the time of delivering the last of the three documents that have been referred to, namely the $13,000 note sued on in this action, the mortgage for same amount securing said note, and said cattle note, relating to the subject of them.

A. I may have had other conversations, but I have no recollection of them now.

Q. Did you at any time prior to the delivering of the documents mentioned in the last question have any conversation with any agent of Wells, Fargo & Co. about the $17,000 note of July 5th, endorsed by you?

A. Never.

Q. Who wrote these words above your endorsement on that note—Exhibit B?

A. They are in my handwriting.

Q. When written?

A. I do not recollect whether it was at the time the note was endorsed by me, or at maturity of the note.

Q. What did Smith say to you in regard to security when he asked you to endorse this note—Exhibit B? Give his language.

A. As near as I can recollect, he asked me if I would endorse his note for $17,000; that he had a deed of trust made out in favor of Wells, Fargo & Co. for his property, but he preferred giving a mortgage to me to secure me in endorsing for him to giving a deed of trust to Wells, Fargo & Co.; that they wanted the matter fixed up at once, and

that if I would endorse the said $17,000 note, he would make me a mortgage to secure me against endorsing said paper. I asked him if his property was free from encumbrance of every nature, including
31 the residence he was then living in. He stated to me that his property was free from encumbrance. I asked him what his residence was worth; my recollection is that he stated that he had been offered either $20,000 or $22,000 for it within twelve months previous to this time—July 5th, 1873.

Q. You have stated before that he mentioned some way of paying a portion of this $17,000. I ask you now if you enquired of him or he informed you how he expected to pay the balance of the $17,000, or whether he gave you to understand that he expected you to take care of this note, and get your money again through the mortgage?

A. My recollection is that there was nothing said about the balance.

Q. Then it was left to inference whether he expected to pay it or you to take care of it?

A. I suppose it was left to inference.

Q. When you endorsed that note and took that security, did you do it with the expectation of paying it yourself, or of his paying it at maturity?

A. I expected to pay the note in case of his failure to do so. I don't think paying at maturity ever came into my mind. I don't recollect whether I expected to pay it at maturity or not, but I expected that I might have to pay the note.

Q. Did you endorse it with the expectation that he would fail to take care of it?

A. I expected that I might have to pay the amount, less the $6,000 or $7,000 that I thought he would pay.

Q. Why do you substitute the word might, in your answer, instead of answering whether you expected you would have to pay the note?

A. Only because he might pay the note himself.

Q. Notwithstanding the faint hope that Smith would pay the note, you endorsed it without having any security?

A. Certainly I endorsed it, believing that he would undoubtedly fulfill his promise, to give me security for so endorsing, or I
32 never should have endorsed the note.

Q. Mr. Kerr, were you not mistaken in your recollection, that you endorsed this note, Exhibit B, on the day it bears date; is it not a fact that you endorsed it about the time of its maturity, to obtain a further extension of time for Smith?

A. I don't think I am mistaken about the endorsing this paper on the day of its date; I did not endorse the paper for the purpose of getting an extension on it.

Q. How did you transfer to Wells, Fargo & Co. the $13,000 mortgage and the accompanying note; by what instrument?

A. Simply by my endorsement on the back of the note, and handing both papers to them.

Q. Have Wells, Fargo & Co. ever demanded payment of you of this $17,000 note?

A. I think not.

Q. Have you ever requested Wells, Fargo & Co. to foreclose the mortgage in question?

A. I did, sir.

Q. Do you not indemnify them against the expense of it?

A. I suppose I shall have to; that is the general rule of doing business.

Q. Does not your attorney assist in the prosecution of the suit?

A. Yes, sir.

Q. Did you receive any receipt from Wells, Fargo & Co. when you delivered the $13,000 note and the cattle note?

A. I did not.

Q. Were they received by Wells, Fargo & Co. as payment or part payment as far as you were concerned?

A. Not that I know of.

Q. In the waiver of demand and protest on the back of Exhibit B is "value received," what was that?

33 A. Nothing but a form; I received nothing.

Redirect examination:

Q. Was there any understanding as to time on the $17,000 note at the time of the delivery of the $13,000 note to Wells, Fargo & Co., and, if so, what was the understanding or agreement?

(Counsel for Neslin object to this, as calling for conclusions instead of facts.)

A. I don't recollect about any understanding at that particular time, but there was an understanding that the $13,000 note should be sued on and collected, if possible, before the other was prosecuted.

Cross-examination renewed:

Q. When was that agreement made, and with whom?

A. The understanding was with Mr. Wadsworth, but as to the time, I do not recollect. It was long before this suit was commenced.

Q. When was it, with reference to the time of the delivering of the $13,000 note and mortgage, before or afterwards?

A. I think it was afterwards.

Q. What enquiries did you make otherwise, then, of Mr. Smith, as to the title to or encumbrances on the premises you took the $13,000 mortgage on?

A. None whatever.

JNO. W. KERR.

Hon. ZERUBBABEL SNOW, being duly sworn on behalf of the plaintiff, testified as follows:

I have resided in Utah Territory since July, 1851; was during the first four years of that time judge of this district court; spent the next succeeding four or five years in merchandising, and much away from here; after that was six years probate judge, and have since

34 that time been at the bar throughout this Territory. I am as much acquainted with the customs of the people of Utah, relating to the recordation of deeds and other conveyances, as any man in my position would be likely to be.

Q. What were the customs as to the recordation of deeds of conveyances of real estate and of possessory rights to real estate, and of mortgages to such property, from July, 1851, to September 29th, 1873?

A. From the time I came here till 1854, so far as recording is concerned, parties were in the habit of calling on the recorder and simply making a memorandum of such transfers. After that date the instruments were made in better shape. I refer to conveyances and mortgages. Always, after 1854, records were recognized and treated as notice to subsequent purchasers. I have had a fair chance to know that this was the general understanding.

Cross-examination:

Q. Do you know the custom of the entire Territory, as to recording deeds and mortgages during the period you have lived here?

A. I think I do reasonably well, though I have not been in every part of it. Men from nearly every portion of it have called on me for counsel on these subjects.

Q. Are not the following about all the facts you can testify to on this subject, viz, that there is a recorder provided by law in each county, who has kept a set of books for recording deeds and such other papers as parties offered for record, and that in counties where you have been most familiar with the people, that these books have been filling up with instruments being recorded, including deeds, mortgages and contracts and other instruments?

A. Of course I know there is a law for recorders, to be appointed, and for them to keep books, but this is not all. I have frequently been conferred with, as counsel by parties from nearly every section, and conversed with recorders and the people generally. When on the bench as judge I have rendered decrees in foreclosing mortgages, and have acted as attorney in such matters.

35 Q. Can you say that it is the uniform custom of all the people of all the Territory, or of the people of any municipal division of it, to record all the mortgages?

A. I cannot say that they record them all, but I think they do, either in the counties or cities. I intend to say that I think that is the general practice.

Q. Do you think between any given period between 1851 and this time, you were personally cognizant of all the mortgages that were executed and delivered between parties in any municipal division of the Territory?

A. I don't think I was.

Q. Can you tell what was done with them?

A. I cannot.

Q. Can you tell whether any mortgages failed because they were not recorded?

A. I don't think that I can, but I have advised many persons not to sue on unrecorded mortgages, other incumbrances having intervened.

Q. Did each of these many persons have an unrecorded mortgage?

A. I have had many persons come to me with unrecorded mortgages for consultation (when they have explained that other persons had recorded mortgages, and I have advised them not to sue).

(Counsel for Neslin objects to that part of the foregoing answer embraced in parenthesis as not responsive to his question.)

WITNESS adds: I have always advised parties to have their mortgages recorded, and that the record would be notice to subsequent incumbrancers.

(Counsel for Neslin object to this, for same reason as stated last above.)

Z. SNOW.

HENRY WADSWORTH, a witness produced and duly sworn on behalf of the plaintiff, testified as follows:

36 In September, 1873, about the 26th, I arrived here, and took charge of the business of Wells, Fargo & Co.

Q. After you arrived here, who was Wells, Fargo & Co.'s principal officer at Salt Lake City, and had charge of the company's bills receivable and banking business at this point?

A. Since my arrival here I have had the entire management of the entire business of Wells, Fargo and Co. at this point.

(Attention of witness is called to Exhibit B.)

Q. State whether or not you found this note, on your arrival here, among the bills receivable and assets of plaintiff.

A. I did.

(Attention of witness is called to the note sued on in this action.)

Q. Examine this note and state at what time, as near as you can recollect, the plaintiff received this note and the mortgage securing the same, and from whom?

A. This note was delivered to me by Mr. John W. Kerr, at its date, or very soon thereafter; the mortgage securing the same I also received from John W. Kerr, and, I think, within ten days after I received the note.

Q. Mr. Wadsworth, under what conditions, understanding, or agreement was the note in suit—the mortgage securing the same—transferred and delivered to Wells, Fargo & Co.?

A. The note was delivered as security on this note of $17,000—I mean the note and mortgage were so delivered; the proceeds were to be applied in paymentof this former note (Exhibit B) when collected, and in consideration of this security being deposited, the understanding with Mr. John W. Kerr was that we should before proceeding to collect the $17,000 note given us, we should wait till this note, which was left with us for security, matured, and we should endeavor to realize the money from it.

Q. What if any portion of the $17,000 note, being Exhibit B above referred to, has been paid to Wells, Fargo & Co.?

A. At the time of the commencement of this action nothing; since the commencement $300, which is endorsed on the back.

37 Q. What amount at this date, if any, remains due, owing, and unpaid on said last-mentioned note, from Charles F. Smith, the maker, and John W. Kerr, the endorser thereof?

A. The entire amount, less the $300 receive' for rents.*d.*

Cross-examination:

Q. Who was Wells, Fargo & Co.'s agent immediately preceding your becoming such?

A. George L. Greathouse was their local agent here, the same as I am.

Q. State what security Wells, Fargo & Co. had for the $17,000 note, Exhibit B, at any time prior to the delivery of the $13,000 note and mortgage.

A. They had no security, to my personal knowledge; none that I found, except, of course, the endorsement on the back of the note.

Q. How did you regard the endorsement as regards security?

A. I considered Mr. Kerr good.

Q. Did you ask him for further security?

A. My instructions were to collect all notes, and all creditors of the bank were so notified, Mr. Kerr among the rest.

(Counsel for Neslin object to this answer as not re ponsive to the question.)

Q. Repeat the question.

A. I did not.

Q. Did you personally, or did any other agent of the plaintiff, to your personal knowledge, at the maturity of the $17,000 note, Exhibit B, or at any other time afterwards, and, if so, when, demand the payment of it of Mr. Kerr or Smith?

A. I have had frequent conversations with Mr. Kerr about the note, but as to formal demand, I don't think there was any, either of him or of Smith; the note is itself payable at the bank, and this is a demand of itself at maturity.

Witness desires to make the following explanation, viz: My
38 instructions from the company were to collect all past due notes.

Mr. Kerr was so informed on the deposit of this security; the agreement with him was, before commencing action to collect the $17,000 note we would wait till the note of $13,000 matured, and would endeavor to realize on that. This action of mine was reported to the company.

Q. Were not these instructions to you in writing?

A. No, I think not; I think I did not have instructions in writing at all. The treasurer of the company came here with me at the commencement of my agency, and these instructions were given me as we were going through the papers and books.

Q. Was not your report of your action in reference to Exhibit B made in writing?

A. Very likely. I think they were.

Q. Did you make the report personally or direct it to be made?

A. If it was made in writing, I made it. I am not sure it was in writing.

Q. If the report was made in writing have you not a letter-press or other copy of it?

A. I can't tell whether I have a letter-press copy or not; my letters are not all copied.

Q. Will you examine and see if you have a copy, and, if you have, produce it?

A. I will.

Q. When did you take charge of plaintiff's business here, as agent?

A. I arrived here between the 26th and 30th of September, 1873.

Q. Were you then acquainted with John W. Kerr and his financial condition?

A. Only such as I gathered from the employees in our office. I was a stranger to him except as I met him just before we started from San Francisco and traveled with him on the cars.

39 Q. Did you not conclude from information given you, when your attention was first drawn to this note, that John W. Kerr's endorsement was perfect security for it?

A. I was told by Mr. King, I think by the treasurer of the company, that he considered Mr. Kerr good at that time. I *I* could come to no other conclusion, but that it was good. I did conclude it was good.

Witness desires to explain further, as follows, viz: My instructions were, where it was found impossible or inexpedient to collect pas due notes, to take such securities as could be obtained.

Q. Did you have any conversation with Mr. Kerr with respect to this $17,000 note before he brought to you the $13,000 note?

A. The thing was two years ago and I can't remember what conversations I had. I can't remember whether I had any conversation with Mr. Kerr before he brought the $13,000 note. It was during the panic of 1873, and things were pretty much mixed.

Q. Do you distinctly remember the fact of his bringing the $13,000 note and delivering it to you, and what was said at the time?

A. I distinctly remember his bringing the note, and that it was security for the debt. I distinctly remember the conversation—very distinctly remember it.

Q. Was it at that time either impossible or inexpedient, and if inexpedient, in what sense, to collect this $17,000 note of Mr. John W. Kerr?

A. It was not thought impossible. It was thought inexpedient to force payment at the risk of embarrassing a good customer of the bank or company.

Q. Your answer implies that Mr. Kerr was such a customer; do you mean it?

A. We consider Mr. Kerr a good customer and friend of our bank.

Q. Were not Wells, Fargo & Co., at that time, as part of their business, bankers?

A. They were.

40 Q. Was it not their custom, when paper in bank of good customers was not paid at maturity, and time extended for payment, to require payment of interest monthly, or at end of such period as you extended time?

A. It is not their custom universally to collect interest promptly; the general rule is to collect, and but for the understanding spoken of, the interest would have been collected at stated times on this note.

Q. Did that $13,000 note and mortgage afford you any readier and more effectual means of realizing the $17,000 debt than the endorsement did?

A. I don't know that it did; any additional security is always acceptable to a bank and made the collection of a debt more certain.

Q. Do banks usually, of their own accord, grant long time to good customers without payment of interest; in the mean time on debts past due, to get mortgage security?

A. I can't tell what the custom of banks usually is; the usual custom is to collect interest monthly. There are occasions when a bad debt is secured to a bank, by a good customer, that he is granted almost any time he asks for to pay the debt, or interest. Banks do not of their own accord grant time to anybody on debts past due; that is, without they ask for it.

Q. Did you not receive these collaterals from Mr. Kerr, instead of suing him on his endorsement, to favor him by obtaining payment without having recourse on him on his endorsement?

A. It was a matter of indifference to us who paid the note; it was a favor to him to extend the time; a favor we are glad to show to any customer. I think we did not receive the collateral to show Mr. Kerr a favor by obtaining payment without recourse to his endorsement.

Q. Why did you wait from September, 1873, till April of the following year, before commencing proceedings to foreclose your mortgage or otherwise collect your debt?

A. I didn't know; don't think there was any special reason; we wait on a good many customers.

41 Q. State the conversation between you and Mr. Kerr when he delivered the $13,000 note to you; the conversation; not the result merely.

A. I can only say it was left there as security for the debt; the entire conversation I can't remember. I remember Mr. Kerr saying that he was perfectly willing to leave securities for anything he owed there.

Q. Have you now stated all the details of the conversation that you can now remember?

A. All I remember at present.

Q. You cannot state, then, that when you received the note of $13,000 you were informed there was a mortgage to secure it.

A. I was told there was a mortgage.

Q. You having omitted to mention as any part of that conversation to state that time would be given on the $17,000 note, please explain when that agreement was made.

A. I can't remember the day; whether it was the day the note was given, or before, or afterwards. My impression is it was either at the time or before the $13,000 note was delivered to me.

Q. Did you have any other against Mr. Kerr at that time?

A. I think there was a balance against Mr. Kerr on the books.

Q. Has that balance of account been paid?

A. He has had an open account ever since; has had a large credit with the bank since; it has been balanced since.

Q. Hasn't he had a credit there larger than this $17,000 note?

A. Yes, sir; I think he has.

Q. Is not this suit being prosecuted for his benefit, and at his expense?

42 A. So far as Wells, Fargo & Co. are concerned, it is being prosecuted for their benefit, and at at their expense; it will be certainly for his benefit if we collect this Smith mortgage.

Q. If the plaintiff simply desired to realize that debt of $17,000, and was influenced by no other consideration, would it have sought to collect it by these proceedings?

A. To assist a customer, we would do, at any time, the same thing; no other consideration but to assist a customer, that I know of. This particular debt of Mr. Kerr's was for this man Smith, and we would at any time endeavor to collect of the principal the debt, before proceeding against the sureties. Circumstances would govern me in all cases; it is a matter of indifference to the bank when the money is paid; where it has come from; but we would always go against the principal rather than a surety, who is our customer; no interest has been paid on this note except the $300; that $300 was paid by the tenant of the house, as rent, by Mr. Meader; J. B. Meader, I believe.

Q. Did plaintiff lease the premises to him?

A. We permitted him to go into the house; no regular lease given, I believe.

Q. When?

A. I think about the 15th May, 1875; may have been 1st of May.

Q. Whom did you permit to occupy the premises in 1874?

A. Mr. Smith occupied the premises for a time; the house was vacant after he left till Meader went in.

Q. When did you first obtain the keys and get possession of the house?

A. When Mr. Smith left; I can't tell the time. I think it was immediately after Mr. Smith left the house that the keys were turned over to us.

Q. Did you receive any other security for the $17,000 debt, beside the $13,000 note and mortgage?

A. There was an agreement or note in reference to some stock
43 that Wines and Kimball had, and in which Smith had an interest, left at the same time.

Q. Was it not a promissory note signed by those parties for $6,000?

A. It may be a note; can't tell certain.

Q. Have you that paper now?

A. I can't tell; I think it is in the office now.

Q. Give the names in full of Kimball and Wines.

A. Heber P. Kimball, Len Wines.

Q. State whether that note was received for the same purpose as the $13,000 note and mortgage.

A. It was received for the same purpose as security.

Q. Will you examine and see if you have that paper; and, if you have, produce it?

A. I will.

Redirect examination:

Q. Have you realized any proceeds, and, if so, what, on that note or agreement of Wines, Kimball and Smith?

A. Not a cent.

H. WADSWORTH.

THOMAS MARSHALL, a witness for plaintiff, being duly sworn, testified as follows:

Q. State, if you know, the parties to this cause, plaintiff and defendants.

A. I know both plaintiff and defendants.

Q. State where you were on or about July 5th, 1873, and what transpired in reference to Exhibit B, the $17,000 note heretofore referred to in the testimony of Henry Wadsworth.

A. I was in the city of Salt Lake, acting as attorney and advisor of Wells, Fargo & Co.; was, at or prior to July 5th, 1873, called on
44 by Mr. Braston, an agent of Wells, Fargo & Co. at this place, to advise with him relative to the account of Mr. C. F. Smith, which then amounted to about $17,000; on my advice Mr. Smith was sent for. At Wells, Fargo & Co.'s request Mr. Smith executed and delivered to Wells, Fargo & Co. his deed of trust on the property embraced in this mortgage, together with, I think, his interest in the Congress Mine, Big Cottonwood. I drew the deed of trust myself. After the execution and delivery of said deed of trust, made to secure Smith's said indebtedness to Wells, Fargo & Co., Smith proposed to give John W. Kerr, as his endorser for said indebtedness, in lieu of said deed of trust, which, as attorney of said Wells, Fargo & Co., I accepted. Thereafter Smith, the defendant, brought in and delivered to Wells, Fargo & Co. Exhibit B, endorsed by John W. Kerr, and thereupon Wells, Fargo & Co. took from its safe the deed of trust and note of Smith's, cancelled the same, and delivered the same so cancelled to C. F. Smith.

Q. State what was done, to the best of your recollection, after cancelling, with that note and deed of trust securing it.

A. My best impression is that Mr. Smith tore up and destroyed both deed of trust and note at that time in Wells, Fargo & Co.'s back office; of this I am not certain.

Q. Had it been recorded?

A. It had not. Mr. Smith requested, for Wells, Fargo & Co., to hold it up for a day or two; for what purpose I don't know; not to record it; I think he promised to procure Kerr's endorsement pending that delay.

Q. What was the consideration of the first note secured, and said deed of trust securing it?

A. Mr. Smith was at that time largely indebted to Wells, Fargo &Co., and Wells, Fargo & Co. threatened suit thereon, and, in consideration of delay and time, Smith proposed and did secure the debt by deed of trust first, and Kerr's endorsement afterwards.

Q. What was the amount of that indebtedness?

A. The same, I think, as in Exhibit B; about $17,000.

Q. If you remember, you may state who were the trustees in that deed of trust.

45 A. Marshal & Royle—Thomas Marshall and J. C. Royle. I think we were the trustees; one or other, or both of us were.

Q. And you, as such trustee, at the request of Wells, Fargo & Co., cancelled that deed of trust, and returned it to the maker?

(Counsel for defendant Neslin objects to this question, as being contradictory to what the witness has already stated and leading.)

Q. State again, Mr. Marshall, what was done with that deed of trust.

A. The deed of trust was cancelled. My impression is that I myself crossed out the name of Smith on the deed of trust; I did it as the agent and attorney of Wells, Fargo & Co., having charge of that business, by and with the consent of Mr. Braston, the only other coagent of Wells, Fargo & Co. here.

Cross-examination:

Q. Where does Wells, Fargo & Co. live; or if it is an incorporation, where was it incorporated?

A. Wells, Fargo & Co. was incorporated in Colorado Territory.

Q. Have you ever seen its act of incorporation?

A. I have seen a printed copy; I have one in my office.

Q. Does the act incorporating them purport to give them authority to transact business in Utah Territory?

A. I think it is a general banking, expressing, and staging business without limit as to territory.

Q. And without mentioning the Territory in which it should operate?

A. That is my present impression.

Q. Where is its home office?

A. It has its office in Denver; its president and principal officers reside in San Francisco, California.

Q. With what office do you hold your communications as its agent and attorney?

46 A. My general business is with its local agent here; on important matters I sometimes correspond with its board of directors.

Q. And when you direct to its board of directors, to what place do you direct your communications?

A. San Francisco, California.

Q. Was your authority as agent and attorney in writing, or orally given?

A. Both orally and in writing; in numerous letters from the president and secretary and treasurer of the company, at San Francisco, and in a contract signed by its former agents in Salt Lake City and our firm.

Q. You spoke of part of your authority coming orally—from whom?

A. From the president and former presidents of the company, made here and in New York.

Q. Do you personally know, otherwise than by plaintiff's claiming and Smith's admitting, that Smith was indebted to the plaintiff in July, 1873?

A. No; the amount was admitted by Smith to be due from Smith at the time of drawing the deed.

Q. At what time was Charles F. Smith employee of plaintiff, and in what capacity employed?

A. For several years prior to that time Smith had been in the employ of plaintiff as its teller in its bank in this city, and was discharged or resigned about this time.

Q. While he was acting as teller, don't you know that defendant Nes-

lin presented periodical claims for interest on his mortgage to Smith as teller, and that the same were paid over the counter of the bank, out of the funds of the bank?

A. I know nothing of the kind.

Q. How long did you or Marshall & Royle have possession of the trust deed you have mentioned before it was cancelled and surrendered?

47 A. Marshall & Royle never had possession of the deed of trust after its execution.

Q. Was the deed of trust ever delivered as such; if so, to whom, and how long retained by the deliveree before it was cancelled and surrendered?

A. It was delivered to Mr. Braston for plaintiff. I examined it and considered it correct. It was held I do not think over 48 hours.

Q. Did the trustee or trustees therein mentioned accept the trust?

A. I consider that we accepted the trust. I do not think we signed it; do think it was a security given and consummated, with the understanding made at the time that on the production and giving to plaintiff of a note for Smith's indebtedness, endorsed by John W. Kerr, that such security or deed of trust should be surrendered to Smith without having the same recorded.

Q. Was that deed of trust in the form in general use in this Territory?

A. I can't say that it was or is now in general use in Salt Lake County. The form of the deed was the same as is ordinarily used. It was a blank filled up.

Q. State whether the note Exhibit B represents the same debt secured, or intended to be secured, by the trust deed?

A. Yes, sir.

Q. Did the trustee or trustees mentioned in that deed reconvey the property, or do any act for that purpose, further than what you have stated?

A. Only by their cancellation and surrender of that deed of trust.

Q. Do you know who appointed Braston agent?

A. No; I do not.

Q. Did you ever see his power of attorney?

A. Never.

Q. What interest in the Congress mine was conveyed, or in-

48 tended to be conveyed, by that trust deed?

A. My impression is—and it is only impression—that on the record Mr. Smith had the title to the Congress mine, and that was embraced in the deed of trust.

Redirect:

Q. Referring to the time of the execution and delivery of the deed of trust, state, if you can, whether the proposition of Mr. Smith to furnish the endorsement of Kerr was made before, or at the time, or after its delivery?

A. It was one and the same time, and his proposition and request so to do was the cause of the non-recordation of the deed.

THOMAS MARSHALL.

JOHN W. KERR, having examined his previous deposition, and desiring to make a correction therein, in the answer to the following question, viz:

"When was it with reference to the time of the delivery of the $13,000 note and mortgage, before or afterwards?"

He now answers the question as follows:

Q. I think it was before or at the time.

Q. In further cross-examination, when you answered the question originally, did you not state, as is recorded by commissioner, that this agreement was after the delivery of the note and mortgage to plaintiff?

A. I answered the commissioner that I thought it was afterwards.

Q. Did you not state in answer to a previous question that you did not recollect about any understanding with the plaintiff at the particular time when the note and mortgage sued on by the plaintiff was delivered to the plaintiff?

A. Yes.

Q. Are you an early riser in the morning, and were you in 1873?

49 A. I rise between 6 and 8 o'clock in the morning and breakfast between 7 and 8 o'clock, and go to business directly after breakfast, as a general thing.

Q. Did you make any memorandum of the agreement with the plaintiff as to time on the $17,000 note, and the time of making such agreement?

A. Yes, sir; I did.

Q. Have you preserved it?

A. I have.

Q. Will you produce it?

A. I will.

Q. Have you consulted that memorandum since you were cross-examined before?

A. Yes.

Q. When did you make the memorandum?

A. I made it on the 29th day of September, 1873.

WILLIAM CLAYTON, sworn on behalf of defendant, says:

I am 60 years of age and upwards; have resided in this Territory 28 years.

Q. In what business were you engaged in 1872; private and official?

A. Notary public and conveyancer.

Q. You were also Territorial auditor, were you not?

A. Yes, sir.

Q. How long have you been notary public and conveyancer?

A. If I recollect right, since about 1861; about 14 years.

Q. From 1861 to 1874 about how many mortgages and other conveyances did you make yearly for customers? Give as correct an *correct an* answer as your recollection enables you to do.

A. I have no idea; they were of frequent occurrence. During the early part of the time I did not make many mortgages. During
50 the last four or five years they have been frequent.

Q. State whether during this period you have been the principal Mormon conveyancer?

A. I have done as much of it as others; perhaps more. They have generally accused me of that.

Q. State whether you have a general acquaintance with the people of the Territory.

A. I have, especially among the old settlers.

Q. From September, 1872, to September, 1873, are you able to state upon previous expression upon the subject, and expression during that period, what was the popular understanding as to the necessity in law to record mortgages for notice to the public? and if so, state it.

(Plaintiff's counsel object to this question as too general, embracing the world and the rest of mankind.)

Q. I modify the question so as to confine it to the popular understanding in this Territory.

(Objected to for that witness has not been shown to have any knowledge of the popular understanding in and throughout this Territory, and no sufficient foundation has been laid for said question.)

A. According to my understanding, at that time, there was no necessity to record mortgages, simply for the reason the people of the Territory had not at that time acquired title to their lands, and there was no law passed requiring mortgages to be recorded till the 20th of February, 1874. According to my knowledge I understood that to be the popular understanding. I believe that was the view entertained by the people of the Territory generally. I have reason to believe it.

Q. State the reason you have for so believing.

A. From my intercourse with the people generally. I had intercourse with the people from all parts of the Territory, and at that time I held personally three mortgages, which were not recorded for the reasons, to the best of my recollection.

51 Q. State if you know what the general practice or custom was with holders of real estate mortgages, in respect to the passage of the statute in 1874 in this Territory, or any portion of it, that you are more particularly familiar with.

My understanding from my associations and business connections with the people was, that the recording of mortgages was the exception and not the rule, until the lands came into the market, and the title was acquired by the people from the government, and property became valuable, and in 1873 everything was very much inflated.

Q. I call your attention now to mortgages, as distinguished from deeds, and ask you to state, if you know, what the practice or custom was in this country during the time mentioned in the last question, among holders of real estate mortgages, where the title had been acquired from the government, in respect to recording them?

A. As I answered before, when the title was acquired from the government and property became more valuable, people were more particular to have their titles, deeds, and mortgages, etc., recorded. I have seen in the last few months a number of both deeds and mortgages, that were executed about that time, that are not yet recorded; there is one of that kind now lying on my desk.

Witness is shown a paper writing, purporting to be a mortgage from defendant Charles F. Smith to defendant Samuel Neslin, bearing date November 27th, 1872, and bearing an endorsement as having been filed for record in the recorder's office of Salt Lake County, and recorded October 6th, 1873, and marked Exhibit No. 1, and accompanying note of same date, purporting to be made by said Charles F. Smith, and marked as Exhibit No. 2, about which the witness is asked, and answers as follows:

Q. State whether you have ever seen these papers before.

A. I have.

Q. Who filled up—drafted the mortgage?

A. I did.

Q. Who is the Wm. Clayton whose name appears as subscribing witness?

52 A. It is my name and my signature.

Q. State what you know of the execution by Charles F. Smith of the said note and mortgage.

A. They were both executed in my presence by him.

Q. What do you know in respect to the delivery of them by Smith, and to whom?

A. They were both delivered by Mr. Smith to Mr. Neslin in my presence.

Said note and mortgage, with the endorsements thereon, Exhibits 1 and 2, are offered in evidence by counsel for Neslin, and attached.

(Objected to by plaintiff as irrelevant and immaterial.)

Cross-examination:

Q. Mr. Clayton, are you an attorney at law?

A. No, I am not; thank fortune.

Q. You say you have been here 28 years; please state in what business you were engaged immediately after you first came to Utah.

A. I was a clerk in several kinds of business.

Q. When did you first become a notary public and conveyancer?

A. I think in 1861.

Q. Have you been a notary public and conveyancer ever since?

A. I have.

Q. In what other business have you been engaged since 1861?

A. In 1861 and 1862 I was bookkeeper for Hooper & Williams, merchants; I think, in the years 1864–'5, I was in partnership with Geo. Cronin, in mercantile business; in 1866, was in the notarial business altogether, except that I was auditor and recorder of brands, and
53 general collecting agent for collecting money in all parts of the world, which I have always been since 1861. In 1867–'8 I had charge of John Robbins' lumber-yard and books; in fall of 1869 to 1871, I was secretary of Zion's Coöperative Mercantile Institution; since that time have attended to notarial and other business alone. I allude, "in other business," to auditor's, recording brands, and collecting money in different parts of the world.

Q. Prior to 1872, were not the citizens of Utah careless as to the form of their transfers of property and of mortgages and property, and as to the recording of such papers?

(Counsel for defendant Neslin objects to the question because it calls for the opinion of the witness on law and fact.)

A. I do not consider that they were particularly careless, because they did not claim to have any title to the lands; there was no law requiring titles to be recorded. According to my understanding, when people did have their titles recorded it was more a matter of safety than any requirement of law or custom.

Q. Were not possessary rights sold and by deeds transferred before patents were obtained for the lands in Utah?

A. Quit-claim deeds were frequently issued for land claims and improvements in various forms.

Q. Are you acquainted with or have you examined the county records in the county recorder's office of Salt Lake County?

A. I am not much acquainted with them. I don't think I have had occasion to examine them a dozen times in the whole.

Q. Have you ever seen Mortgage Book A?

A. I presume I have, but I can't say positively that I have.

Q. Have you ever seen Mortgage Book B?

(Counsel for Neslin objects to this question because it assumes there is a Mortgage Book B.)

A. I can't answer distinctly. I had occasion to examine a certain

mortgage about a year ago, but whether it was in book A or B I don't recollect.

Q. Did you ever see Mortgage Book C.

54 A. I can't say. I believe I have examined but one mortgage altogether, and I can't say what book it was in.

Q. Did you ever see Mortgage Book D?

A. I don't know. Have had very little to do with them.

Q. Do you not know that transfers and mortgages of city lots in this city were in the early days recorded in the city records, and afterwards transferred to the county records?

A. I do not know that. The first records kept here were by entering a man's name on the lot he professed to own, on the plot made by Surveyor Fox, afterwards a memorandum book was kept in which was recorded the person's name, and the lot and block he professed to own; this was from '49 to 1853, and were all the records kept at that time to my knowledgk.

Q. Do you not know that from about 1854 up to about 1866–'7, that the transfers and mortgages of city property were recorded in the city recorder's books—I mean transfers and mortgages of city lots—and so continued to be until these records were transferred to the county recorder, Woolley's office?

A. I have no such knowledge.

Q. Did you know Leo. Hawkins in his lifetime for a number of years?

A. I knew him well, but I never knew him as a city recorder.

Q. Is it not a fact that from about 1860 up to the dates of their respective deaths, in 1866 and 1870, that the bulk of conveyancing and acknowledging deeds and mortgages was done in this city by Wm. I. Appleby, clerk of the supreme court, and Patrick Lynch, notary public and clerk of the third district court?

A. If it is a fact I do not know it, and do not so understand it.

Q. Do you not know, and is it not the fact, that a large proportion of such acknowledgements during the time mentioned, and up to the present time, of the Mormon community, were taken before E. D. Woolley, county recorder of this county?

A. I believe that a large proportion of the acknowledgments were

55 taken before E. D. Woolley, after he was elected county recorder, but when that was I do not now remember.

WILLIAM CLAYTON.

SAMUEL NESLIN, sworn for defendant, says:

I am the defendant, Samuel Neslin; am in my 68th year of age; have been a carpenter by trade.

Q. State whether you have been accustomed to do much business in conveyancing and mortgaging.

(Counsel for plaintiff objects as irrelevant and immaterial.)

A. Not much.

Exhibits No. 1 and 2 are shown to the witness and he is asked—

Q. State whether you are the Samuel Neslin mentioned in said exhibits.

A. Yes, sir.

Q. What was the note and mortgage marked Exhibits 1 and 2 given for?

(Counsel for plaintiff objects as irrelevant and immaterial.)

A. They were to secure the remainder of the purchase-money on the premises sold to Mr. Smith.

Q. What were these premises?

(Objected to as immaterial and irrelevant.)

A. The same as described in the mortgage.

Q. Why did you delay recording the mortgage after the date of it till September, 1873?

(Objected to as immaterial and irrelevant.)

A. Because we were told by Mr. Clayton that it was unnecessary to record it.

Q. State what payments have been made on this note and mortgage.

56 (Objected to as irrelevant and immaterial on the part of the plaintiff.)

A. No payments have been made.

A. State whether interest notes for interest on the principal note, Exhibit 1, were made by Charles F. Smith to you; interest notes till March, 1873.

(Objected to by p'aintiff as irrelevant and immaterial.)

A. Yes; interest notes on the principal note were given, I think, commencing in April, 1873, covering the time till November, 1873, and these notes have all been paid excepting for two months.

Q. To whom were these interest notes paid?

A. To myself.

Q. By whom and where?

(Objected to by plaintiff as irrelevant and immaterial.)

Q. By Mr. Smith. Part of them at Wells, Fargo & Co.'s, the last two after he left there; the last two that were paid.

Q. In what capacity was Smith acting when he paid these notes which were paid at Wells, Fargo & Co.'s?

(Objected to by plaintiff as irrelevant and immaterial.)

A. I suppose he was acting in the capacity of clerk; he was behind the counter in plaintiff's bank, and paid the notes over the counter there.

Cross-examination:

Q. Mr. Neslin, was the Mr. Clayton who advised you it was not necessary to record the mortgage of defendant Smith to you, which you have testified to in your examination-in-chief, the Wm. Clayton who has given evidence in your behalf in this cause?

A. Yes, sir.

Q. Can you produce these two unpaid interest notes?

A. Yes, sir; I will produce them and have copies attested.

57 The notes paid by Smith were in the same form except as to date of payment.

C. W. BENNETT, a witness produced by defendant Neslin, being duly sworn, makes oath and says, my name is Charles W. Bennett; residence Salt Lake City, Utah; occupation a practising attorney.

Q. Are you acquainted with the rule as to the charges and fees of attorneys for making collections and for foreclosing mortgages by suit in court, as it prevails in Salt Lake City?

A. I know of no definite rule, but am familiar with the customary charges for such work, so far as there is any custom.

Q. Have you examined the files in this action, and do you know what the case is? If so, you may state what would be a reasonable attorney fee for defending said action, and foreclosing the mortgage set up in the answer of defendant Neslin.

A. I have examined the files and have a general knowledge of what the case is; from the labor involved, my judgment is that one thousand dollars would be a very reasonable fee.

Q. What would be a reasonable fee for foreclosing the mortgage mentioned, without reference to the claim of the plaintiff?

A. The claim and counter-claim are so intimately connected that I see no way by which I could divide the fee, to make part apply to one and part to the other; I think the amount mentioned in the Neslin mortgage, three per cent. on the amount secured and collected, is a very small fee, and less than the ordinary charges.

Plaintiffs decline any cross-examination.

W. BENNETT.

Defendant Neslin here rests his case.

E. D. WOOLLEY, a witness produced by plaintiff, being duly sworn, testifies as follows:

Q. What is your name, residence, age, and occupation?

58 A. My name is Edwin D. Woolley, residence Salt Lake City, Utah; age 68 years; occupation is that of county recorder of Salt Lake County, Utah.

Q. How long have you filled the office of the county recorder?

A. I have filled the office of recorder and deputy recorder for the last 15 years—been county recorder for the last twelve years.

Q. Are you familiar with the records of your office, the course of business of your office, the mode of recording conveyances, transfer of land claims and mortgages affecting land claims (and such mode as has prevailed in Salt Lake County for the last 15 years)?

(Counsel for defendant Neslin objects to that part of this question in parenthesis, enquiring as to the mode which has prevailed in Salt Lake County for the last fifteen years, as leading and immaterial.)

A. I am acquainted with it.

Q. State if conveyances and transfers of land and claims and mortgages are, or are not, recorded in the same set of books?

(Counsel for defendant Neslin objects to this question as immaterial and leading.)

A. They are not recorded in the same set of books. We have one set of books for recording deeds and transfers proper, and another set for recording mortgages and deeds of trust.

Q. How many books of mortgages and deeds of trust have been filled to this date?

A. It amounts to about five books.

Q. Can you give, and, if so, please give it, the approximate date of the first mortgage recorded?

A. I cannot tell exactly.

Q. Were mortgages recorded on your records as far back as fifteen years ago?

59 (Counsel for defendant Neslin objects to this question as immaterial.)

A. Yes, and longer.

Q. Please state, if you are able, about the average number of pages in each of these five books, and the number of mortgages?

(Counsel for defendant Neslin objects to this question as immaterial.)

A. About a thousand pages in each book, and about seven hundred mortgages in each.

Cross-examination:

Q. About what number of these books were filled up prior to February, 1874, and how many since that time?

A. About four books; one book has been filled since, and about three hundred pages in another.

Redirect examination:

Q. Are you acquainted with the custom and usage of the citizens of this county, as to recording mortgages and tranfers of land claims, prior to and including the year 1873? If so, state it.

(Objected to by counsel for defendant Neslin as immaterial and irrelevant.)

A. Yes, I am; it was the custom to record.

Q. What was the general understanding among the citizens as to the effect of the usage and custom of recording transfers and mortgages of land claims, as to priority of right?

(Objected to by counsel for defendant Neslin as immaterial and irrelevant.)

A. The understanding of the people is various; the majority of
60 the people hold that prior record takes precedence, but there are some that don't consider a record of any account at all.

EDWIN D. WOOLLEY.

Case is here closed.

E. T. SPRAGUE.
Referee.

That the foregoing, with the exhibits hereto attached, was and is all the evidence taken in said action.

(Copy.)

$17,107.00. SALT LAKE CITY, *July 5th*, 1873.

Sixty days after date, for value received, I promise to pay to the order of John W. Kerr seventeen thousand one hundred and seven dollars, negotiable and payable at the banking house of Wells, Fargo & Co. in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month, from date until paid, both before and after judgment.

(Signed) CHAS. F. SMITH.

No. , due, .

This indenture, made the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-three, between Charles F. Smith, of Salt Lake City, in the county of Salt Lake and Territory of Utah, the party of the first part, and John W. Kerr of the city, county and Territory aforesaid, the party of the second part witnesseth:

That the said party of the first part is justly indebted to the party of the second part, in the sum of thirteen thousand dollars, lawful money of the United States of America, upon a certain promissory note, made at the date hereof, by the said party of the first part, to the said party of the second part, in the words and figures following, to wit:

61 $13,000.00.] SALT LAKE CITY, *September 27th*, 1873.

Sixty days after date, for value received, I promise to pay to the order of John W. Kerr thirteen thousand dollars, negotiable and payable to the banking house of T. F. Tracy & Co., in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month, from date until paid, both before and after judgment.

(Signed) CHAS. F. SMITH.

Now, this indenture witnesseth that for the purpose of securing the payment of the said promissory note, and the interest thereon, as it shall become due and payable, the said party of the first part, for and in consideration of the premises, as also in consideration of the sum of one dollar lawful money, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey, and confirm unto said party of the second part, his heirs and assigns, all that certain lot, piece, or parcel of land situate, lying and being in Salt Lake City, in the county of Salt Lake and Territory of Utah, described as follows, to wit: being lot two (2) in block number thirteen (13), plat D, of the Salt Lake City survey, the said lot being situated on the corner of South Temple street and Walnut street, in Salt Lake City, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining:

To have and to hold the said premises, with all the tenements, hereditaments, and appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns forever; provided, nevertheless, that if the said party of the first part shall well and truly pay or cause to be paid the said promissory note, with the interest as it shall become due and payable thereon, according to the tenor thereof, then, in such case this indenture, and the estate hereby granted, shall be null and void, else to remain in full force and virtue. But it is distinctly understood and agreed that if the interest on said promissory note, or the principal thereof, shall not be punctually paid when the same becomes due and payable, as in said promissory note mentioned, then and
62 in such case the principal sum of said promissory note and the interest shall be deemed and taken to be wholly due and payable; and proceedings may forthwith be had by the said party of the second part, his heirs, executors, administrators, or assigns, for the recovery of the same, either by suit on said note, or on this mortgage, anything in said note or in this indenture contained to the contrary notwithstanding; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest, on either the said note or this mortgage, it shall and may be lawful for the said party of the second party, his heirs, executors, administrators, or assigns, to include in the judgment that may be recovered counsel fees and charges of attorneys and counsel employed in such foreclosure suit, not exceeding two per cent. on the said principal sum, as well as all payments that the said party of the second part, his heirs, executors, administrators, or assigns may be obliged to make for his or their security, or on account of any taxes, charges, incumbrances, or assessments whatever, on the said premises.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] CHAS. F. SMITH.

Signed, sealed, and delivered in presence of—

WM. CLAYTON.

UNITED STATES OF AMERICA,

Territory of Utah, Salt Lake County, ss:

On this twenty-seventh day of September, A. D. one thousand eight hundred and seventy-three, before me, the undersigned; notary public within and for Salt Lake County, in the Territory of Utah, duly elected, commissioned, and qualified, personally appeared Charles F. Smith,

whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and
63 duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. T., the and year in this certificate first above written.

[SEAL.] WM. CLAYTON,
Notary Public for Salt Lake Co., U. Ter.

$7,000.00.] SALT LAKE CITY, *November 27th*, 1872.

One year after date, for value received, I promise to pay to the order of Samuel Neslin the sum of seven thousand dollars, negotiable and payable at the banking-house of Wells, Fargo & Co., in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month, from 1st of March, 1873, until paid, both before and after judgment.

CHAS. F. SMITH.

No. , due .
(Secured by mortgage.—Wells, Fargo & Co.)

This indenture, made the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and seventy-two, between Charles F. Smith, of Salt Lake City, in the county of Salt Lake and Territory of Utah, the party of the first part, and Samuel Neslin, of the city, county and Territory aforesaid, the party of the second part, witnesseth, that the said party of the first part is justly indebted to the said party of the second part, in the sum of seven thousand dollars, currency of the United States of America, upon a certain promissory note, made at the date hereof, by Charles F. Smith, in the words and figures following, to wit:

$7,000.00.] SALT LAKE CITY, *Nov. 27th*, 1872.

One year after date, for value received, I promise to pay to
64 the order of Samuel Neslin the sum of seventeen thousand dollars, negotiable and payable at the banking house of Wells, Fargo & Co. in Salt Lake City, without defalcation or discount, with one and one-half per cent. interest per month from date until paid, both before and after judgment.

(Signed) CHAS. F. SMITH.

Now this indenture witnesseth, that for the purpose of securing the payment of the said promissory note and the interest thereon as it shall become due and payable, the said party of the first part, for and in consideration of the premises, as also in consideration of the sum of one dollar, lawful money, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, all that certain lot of land situate, lying, and being in Salt Lake City, in the county of Salt Lake and Territory of Utah, and known and described as lot number two (2) in block number thirteen (13), plat D, in Salt Lake City survey, the said lot being situated on the corner of South Temple street and Walnut street in Salt Lake City, together

with all and singular tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining; to have and to hold the said premises, with all the tenements, hereditaments, and appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns, forever:

Provided, nevertheless, that if said party of the first part shall well and truly pay, or cause to be paid, the said promissory note, with the interest as it shall become due and payable thereon, according to the tenor and effect thereof, then in such case this indenture and the estate hereby granted shall be null and void; else it remain in full force and virtue.

But it is distinctly understood and agreed, that if the interest on said promissory note or the principal thereof shall not be punctually paid when the same becomes due and payable, as in said promissory note mentioned, then, and in such case, the principal sum of said promissory note and the interest shall be deemed and taken to be wholly due and
65 payable, and proceedings may forthwith be had by the said party of the second part, his heirs, executors, administrators or assigns, for the recovery of the same, either by suit on said note or on this mortgage, anything in said note or in this indenture contained to the contrary notwithstanding. And in any suit or other proceedings that may be had for the recovery of the said principal sum and interest, on either the said note or this mortgage, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to include in the judgment that may be recovered counsel fees and charges of attorneys and counsel employed in such foreclosure suit, not exceeding three per cent., as well as all payments that the said party of the second part, his heirs, executors, administrators or assigns, may be obliged to make for his or their security, or on account of any taxes, charges, incumbrances or assessments whatever, on the said premises.

It is further distinctly hereby understood, that in the event the said party of the first part should be unavoidably absent from Salt Lake City when the said note becomes due, the said party of the second part consents to grant an extension of ninety days for the payment of said note.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] CHARLES F. SMITH.

Signed, sealed, and delivered in the presence of—
G. M. OTTINGER.
WM. CLAYTON.

UNITED STATES OF AMERICA,
Territory of Utah, county of Salt Lake, ss:

On this twenty-seventh day of November, A. D. one thousand
66 eight hundred and seventy-two, before the undersigned, a notary public within and for Salt Lake County in the Territory of Utah, duly elected, commissioned, and qualified, personally appeared Charles F. Smith, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. Ter., the day and year in this certificate first above written.

[SEAL.] WILLIAM CLAYTON,
Notary Public, Salt Lake County, U. Ter.

That on the said 31st day of January, A. D. 1876, the said referee reported the said evidence to the court, and the said report and evidence were duly filed.

That thereafter, on the day of A. D. 1876, the said cause was duly brought on to be heard before the court upon the pleadings and proof; and after argument of the counsel for the respective parties, the same was submitted to the court and by it taken under advisement.

That thereafter, upon the day of , A. D. 1876, the court, being fully advised in the premises, made and filed its findings in the words and figures, following:

67 *Findings of the court.*

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants.

And now on this first day of August, A. D. 1876, the court having fully considered the said cause, makes the findings of facts and conclusions of law and orders a decree in accordance therewith, viz:

The court finds that the mortgage given by the defendant Smith to one Kerr, dated the 27th day of September, A. D. 1873, was given for a valuable consideration, and that the said mortgage and the notes therein specified were by the said Kerr assigned and transferred to the complainants for a valuable consideration before the maturity of the said note, and that neither the said Kerr nor the said complainants had any notice, actual or constructive, of any prior liens on the property covered by said mortgage at the time when they respectively received the said notes and mortgage.

Second. That the consideration for the note and mortgage sued on by the plaintiff was the endorsement by John W. Kerr of a certain note made by the defendant Charles F. Smith on the 5th day of July, A. D. 1873, for the sum of $17,107.10, which note was made payable to said Kerr in 60 days from date, and was to bear interest at the rate of one and one-half per cent. per month, and that said Kerr endorsed said $17,107.10 note on the 5th day of July, A. D. 1873, upon the request of said Smith and upon his promise to execute and deliver to him the note and mortgage sued on by the plaintiff as part of one and the same agreement.

Third. That said $17,107.10 note was for an indebtedness of said Smith to plaintiff in this action, and that said Kerr endorsed the same as surety and for the accommodation of said Smith, and that said note was delivered to the plaintiff on the day of its date.

68 Fourth. That the said note of $13,000 was by said John W. Kerr assigned, transferred, and delivered to Wells, Fargo & Co. before maturity for a valuable consideration, to wit, as collateral security for the note of said C. F. Smith for $17,107.10, endorsed by said Kerr, and at that time due and payable, and on which said complainants thereupon gave to Kerr additional time and agreed temporarily to refrain from pressing the collection thereof. That no portion of said note $17,107.10, or the interest thereon, has been paid, but the same remains wholly due and unpaid.

Fifth. That on July 5th, 1873, and prior thereto, the defendant C. F. Smith was in the possession of said premises, and remained in such

possession until after the maturity of said note of $13,000, at which time and prior to the hearing herein defendant Smith delivered possession of said premises to the complainant, who is now and ever since has been in possession.

Sixth. That neither the note for $13,000, secured by said mortgage, nor the interest thereon, has been paid, nor any part thereof, except what has been paid by way of rent during the time it has been in the possession of the complainant.

Seventh. That the said mortgage was duly recorded on the records of Salt Lake County, in the Territory of Utah, on the 29th day of September, 1873, at 8 o'clock a. m.

Eighth. That on the 27th day of November, 1872, the said defendant Smith executed and delivered to the defendant Samuel Neslin a note for the sum of $7,000, and a mortgage to secure said note on the same real estate specified in the above described mortgage, which said note for $7,000 was given for part of the purchase money of said property, the same having been sold and conveyed by said Neslin to said Smith by deed duly executed and delivered to said Smith by said Neslin.

Ninth. That the said mortgage to Neslin was duly recorded on *on* the records of said Salt Lake County on the 29th day of September, 1873, at 12.25 o'clock p. m.

Tenth. That neither the said principal sum of $7,000, specified in said Neslin note and mortgage, nor the interest thereon, nor any part thereof, has been paid to said defendant Neslin.

69 Eleventh. That there is due and unpaid to defendant Neslin, for attorney's fees for foreclosing his mortgage, the sum of $300, which is a part of the debt secured by this mortgage.

Legal conclusion.

First. The complainants are entitled to recover from the defendant Charles F. Smith the sum of $13,000, with interest and costs taxed at $, less the sum of $300 received by way of rent for the mortgaged property; which said rent amounts to $300, leaving a balance of $19,-349.50 remaining due to the complainants, with interest from this date until paid at the rate 1½ per cent. per month, and that the said complainants have a prior lien on the said mortgaged premises for that amount.

Second. That the defendant Samuel Neslin is entitled to recover from the defendant Charles F. Smith the said sum of $7,000, with interest from the first day of March, 1873, at the rate of one and one-half per cent. per month until paid, and the further sum of $300 attorney's fees, and that he, the said Neslin, has a lien on said mortgaged property, subsequent and subordinate to the said lien of the complainants; and a decree in accordance with the foregoing finding is ordered, which said decree is entered in Judgment Book C, folio ; and

To which finding, and to each and every part thereof, defendant Neslin duly excepted.

That thereafter, on the said first day of August, 1876, the court made and entered its decree in the words and figures following, to wit:

In the district court for the third judicial district of Utah Territory.

TERRITORY OF UTAH,
Salt Lake County, ss:

WELLS, FARGO & CO. (A CORPORATION), plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, defendants.

First. This case having been brought on to be heard upon the complaint filed therein, taken as confessed by the defendant Charles F., Smith (whose default for not answering thereto has been duly entered) and upon the answer and cross complaint filed thereto by the defendant Samuel Neslin, and upon due proof of the filing of notice of the pendency of this action containing the names of the parties to, and the object of, the action and a description of the property affected thereby upon the 16th day of March, A. D. 1875, in the office of the county recorder of Salt Lake County, where said property is situated, and recording the same in said recorder's office and upon the report of referee E. T. Sprague, which report is filed herein and hereby confirmed, and the court having heard the proofs necessary to enable it to render judgment herein, and the court having made and filed its findings of facts and conclusivenesss of law herein, and it appearing therefrom that there is now due to said plaintiff from said defendant, Charles F. Smith, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint the sum of nineteen thousand three hundred and forty-nine dollars and fifty cents ($19,349.50) with interest from this date at the rate of 1½ per cent. per month and costs of suit taxed at $291.50, and that all the allegations in the said plaintiff's complaint contained are true, and it further appearing to the court that there is now due to said defendant, Samuel Neslin, from said defendant, Charles F. Smith,
71 for principal and interest, eleven thousand three hundred and five dollars ($11,305) which sum is to bear interest from the date hereof, at the rate of one and a half per cent. per month, and the sum of $301.00 as attorney's fees therein.

Second. Now, on motion of Marshal & Royle, of counsel for the plaintiff, it is adjudged and decreed that, all and singular, the mortgaged premises mentioned in the said complaint, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs in this suit, and expenses of sale, and also the amount due from defendant Smith to defendant Neslin, together with interest thereon, attorneys' fees, and costs, and which may be sold separately, without material injury to the parties interested, be sold at public auction by or under the direction of the United States marshal for the Territory of Utah; that said sale be made in the city and county of Salt Lake, at the south front door of the county court-house; that the said marshal gave public notice of the time and place of such sale according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff or any of the parties to this suit may become the purchasers at such sale; and that the said marshal, after the time allowed by law for redemption has expired, execute a deed to the pur-

chaser or purchasers of the mortgaged premises at said sale; that the said marshal, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff (or its attorneys), out of said proceeds, its costs in this suit, taxed at two hundred and ninety-one dollars and fifty cents ($291.50), and also the amount so found due as aforesaid, with interest thereon at the rate of one and a half per cent. per month from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same, and out of the balance, if any there be, shall pay to the defendant, Samuel Neslin (or his attorney), the amount found due from said C. F. Smith to said Neslin, together with interest thereon as aforesaid, attorneys' fees and costs, or as much thereof as the said balance will pay.

Fourth. That the defendants, and all persons claiming, or to claim from or under them, and all persons having liens subsequent to said mortgage from C. F. Smith to John W. Kerr, sued on by plaint-
72 iffs by judgment on decree upon the land described in said mortgage, and they or their legal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action, with the recorder as aforesaid be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said marshal's deed.

And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the marshal's deed for such premises, or any part thereof.

Sixth. And it is further adjudged and decreed that if the monies arising from the said sale be insufficient to pay the amount so found due to the plaintiff as above stated, with the interest, and costs and expenses of sale as aforesaid, the marshal shall specify the amount of such deficiency and balance due to plaintiff in his return of said sale, and on the coming in of said return a judgment of this court shall be docketed for such balance against the defendant Charles F. Smith, and that the defendant, Charles F. Smith, who is personally liable for the payment of the debt secured by said mortgage, pay to said plaintiff the amount of such deficiency and judgment with interest thereon at the rate of one and one-half per cent. per month from the date of said last mentioned, by return and judgment; and that the plaintiff have execution therefor.

Seventh. And if the monies remaining after the payment of plaintiff's debt, interest, and cost, be insufficient to pay the amount so found due from defendant C. F. Smith to defendant Samuel Neslin, his attorneys' fees, interests, and costs, the marshal shall specify the amount of such deficiency and balance due from said C. F. Smith to defendant, said S. Neslin, in his return of said sale; and that on the coming in of said return, a judgment of this court shall be docketed for such bal-
73 ance against the defendant Charles F. Smith, and that the defendant Charles F. Smith, who is personally liable for the payment of the debt to Samuel Neslin, pay to said Samuel Neslin the

amount of such deficiency and judgment, with interest thereon at the rate of one and one-half per cent. per month, from the date of said last mentioned, by return and judgment, and that the defendant Neslin have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the complaint filed in this action, are, as follows, to wit: That certain piece or parcel of land situate, lying and being in Salt Lake City, in the county of Salt Lake, and Territory of Utah, described as follows, to wit: Being lot two (2), in block number thirteen (13), plat D, of the Salt Lake City Survey, the said lot being situate on the corner of South Temple street and Walnut street in said city, county and Territory.

August 1st, 1876.

M. SCHAEFFER,
Judge of the 3rd District Court, Utah Territory.

Thereafter, and within the time stipulated by the parties to said action, to wit, on the 12th day of September, A. D. 1876, the defendant, Samuel Neslin, filed in this court, and served on the plaintiff, in this action, a notice of his intention to move for a new trial herein, which notice is in the words and figures, as follows, to wit:

Notice of intention to move for a new trial.

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION), PLAINTIFF,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, DEFENDANTS.

To Messrs. MARSHALL & ROYLE and C. H. HEMPSTEAD, Esq'rs,
74 *Attorneys for Plaintiff:*

Please take notice that the defendant, Samuel Neslin, intends moving the court to set aside the findings and judgment, or decree heretofore filed, and entered in this action, and for a new trial, and upon the following general grounds: That the evidence is insufficient to justify said findings and judgment or decree. That said findings and judgment and decree are against law. Errors of law occurring at the trial and excepted to by the defendant, Neslin. Said motion will be made on a statement, to be settled and filed hereafter.

Dated September 12th, 1876.

And for inasmuch as the matters aforesaid do not appear in the records of the proceedings of the trial of said case, the foregoing statement has been prepared, and has been agreed upon, and is correct.

Witness our hands this 13th day of September, 1876.

MARSHALL & ROYLE AND
C. H. HEMPSTEAD,
Attorneys for Plaintiff.
JAMES N. KIMBALL AND
J. G. SUTHERLAND,
Attorney for Defendant Neslin.

Statement on motion for a new trial.

And the said defendant, Neslin, assigns the following particular grounds for his said motion, to wit:

FIRST.

The insufficiency of the evidence to support and justify the findings of facts and decision of the court, in the following particulars:

First. The evidence is insufficient to justify the finding stated in the following words, and included in finding numbered "1," viz:

That the mortgage given by the defendant, Smith, to one Kerr, dated 27th day of September, A. D. 1873, was given for a valuable
75 consideration. And then defendant will also contend that the above is not a finding of fact.

Second. The evidence is insufficient to justify the finding stated in the following words, and included also in finding numbered 1, viz:

That the said mortgage and the note therein specified were by said Kerr assigned and transferred to the complainant for a valuable consideration. And then defendant will contend that the above is not a finding of fact.

Third. The evidence is insufficient to justify the finding stated in the following words, and included also in finding numbered 1, viz:

That neither the said Kerr nor said complainant had any knowledge, actual or constructive, of any prior liens on the property covered by said mortgage, at the time when they respectively received the said note and mortgage.

Fourth. The evidence is insufficient to justify the finding numbered 2, in the following words, viz:

That the consideration for the note and mortgage sued on by the plaintiff was the endorsement of John W. Kerr, of a certain note made by the defendant, Charles F. Smith, on the 5th day of July, A. D. 1873, for the sum of $17,107.10, which note was made payable to said Kerr in 60 days from date, and was to bear interest at the rate of one and one-half per cent. per month, and that said Kerr endorsed said $17,107.10 note on the 5th day of July, A. D. 1873, upon the request of said Smith, and upon his promise to execute and deliver to him the note and mortgage sued on by the plaintiff, as part of the same agreement.

Fifth. The evidence does not justify the finding stated in the following words, and included in finding numbered 3, viz:

That $17,107.10 note was for an indebtedness of said Smith to the plaintiff in this action.

Sixth. The evidence is insufficient to justify the finding stated in the following words, and included in the finding numbered 4, viz:

That the said note of $13,000 was, by said John W. Kerr, assigned and delivered to Wells, Fargo, & Co. before maturity, for a
76 valuable consideration, to wit, as collateral security for the note of said C. F. Smith, for $17,107.10, endorsed by said Kerr, and at that time due and payable, and on which complainants thereafter gave to said Kerr additional time, and agreed, temporarily, to refrain from pressing the collection thereof.

The defendant will insist that the $13,000 note was not transferred to plaintiff for a valuable consideration, and that there was not before, or at the time of such transfer, any agreement by plaintiff for forbearance on the said $17,107.10 note, and that the evidence is insufficient to justify either of these findings; and then defendant will insist that the first is not a finding of fact.

SECOND.

Errors of law occur'ing at the trial, and excepted to by defendant Neslin:

First. The court erred in admitting evidence of the endorsements on the mortgage of Charles F. Smith to John W. Kerr, stating the time of recording said mortgage.

Second. The court erred in allowing witness John W. Kerr to answer the following question:

"Please state the circumstances of the execution of said note and mortgage, the consideration thereof from you to Smith moving."

Third. The court erred in allowing said witness, Kerr, to answer the following question:

"For what purpose, or for what consideration, if any, did you endorse and deliver said note to Wells, Fargo & Co.?"

And in not allowing defendant Neslin's objection to the said question and to the answer thereto.

Fourth. Said court erred in not allowing defendant Neslin's objection to introduction in evidence of defendant Smith's note of $17,107.10, referred to in said testimony, as a note of $17,000.

Fifth. Said court erred in not allowing the objection of defendant Neslin to the answer of witness Z. Snow, in these words: When they have explained that other persons had recorded mortgages, and I have advised them not to sue.

Sixth. Said court erred in not allowing the objection of defend-
77 ant Neslin to the answer of Z. Snow, in these words: I have always advised parties to have their mortgages recorded, and that the record would be notice to subsequent incumbrancers.

Seventh. Said court erred in not allowing the objection of defendant Neslin to question put to witness, E. D. Woolley, containing these words: And such mode as has prevailed in Salt Lake County for the last 15 years.

Eighth. Said court erred in not allowing defendant Neslin's objection to the question put to witness, Woolley, in these words:

"State if conveyances and transfers of land claims and mortgages are or are not recorded in the same set of books."

Ninth. Said court erred in not allowing defendant Neslin's objection to the question put to witness, Woolley, in these words:

"Were mortgages recorded in your records as far back as 15 years ago?"

Tenth. Said court erred in not allowing defendant Neslin's objection to question put to witness, Woolley, in these words:

"Please state, if you are able, about the average number of pages in these five books, and the number of mortgages."

Eleventh. The said court erred in deciding, as a matter of law, as stated in the following words: "The complainants are entitled to recover from the defendant Charles F. Smith the sum of $13,000, with interest and costs, taxed at $, less the sum of $300 received by way of rent for the mortgaged property, which said rent amounts to $300, leaving a balance of $19,349.50 remaining due to the complainants, with interest from this date until paid, at the rate of 1½ per cent. per month, and that the said complainants have a prior lien on the said mortgaged premises for that amount.

Twelfth. The court erred in deciding, as a matter of law, that the mortgage from Charles F. Smith to Samuel Neslin is subsequent and

subordinate to the lien of complainants' mortgage, and the decree and judgment declaring said plaintiff's mortgage a prior lien is erroneous.

Thirteenth. The said court erred in its decision, both as a matter of law and of fact, that the mortgage made and executed by defendant Smith to John W. Kerr was made for or upon a valuable consideration.

78 Fourteenth. Said court erred in its decision, both as a matter of law and of fact, that John W. Kerr transferred to the plaintiff, for a valuable consideration, the said mortgage and note so executed by said defendant Smith to John W. Kerr.

And for inasmuch as the matters aforesaid do not appear in the records of the proceedings on the trial of the said cause, the foregoing statement has been prepared, and has been agreed upon, and is correct.

Witness our hands this day of September, A. D. 1876.

JAMES N. KIMBALL AND
J. G. SUTHERLAND,
Attorneys for Defendant Samuel Neslin.

Plaintiff's Attorneys.

To Messrs. MARSHALL & ROYLE and C. H. HEMPSTEAD, esqs.,
Attorneys for Plaintiff:

You will take notice that defendant Samuel Neslin has prepared and presents the foregoing as a statement of the case and assignment of errors, upon which he will rely on his motion to set aside the findings of facts and the judgment or decree herein, and for a new trial.

JAMES N. KIMBALL AND
J. G. SUTHERLAND,
Attorneys for Defendant Neslin.

Filed September 12th, 1876.

C. S. HILL, *Clerk.*
W. P. McBRIDE,
Deputy Clerk.

79 I, Wm. Nelson, United States marshal for the Territory of Utah, do hereby certify that by virtue of and in pursuance of the annexed judgment and decree, I advertised the property described therein, to wit:

All the right, title, interest, claim and estate, which the said Charles F. Smith and Samuel Neslin had on the 27th day of September, A. D. 1873, or may have since acquired in or to the following-described premises, to wit: That certain piece or parcel of land described as follows, to wit: Being lot number two (2), in block number thirteen (13), plat D, of the Salt Lake City survey; said lot being situated at the corner of South Temple street and Walnut street, in said city and county of Salt Lake and Territory of Utah; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, to be sold by me at the south front door of the court-house in the city of Salt Lake, in said Territory of Utah on the 20th day of September, A. D. 1876, at 12 o'clock noon; that I caused due and legal notice of said sale to be given by posting for twenty days next previous thereto in three public places in said city of Salt Lake where said property is situate and sold, written notice of the time and place of said sale, in which notice said property was particularly described, and that on the said day appointed for said said sale I attended at the

hour and place fixed for said sale, and exposed the said premises for sale in one parcel at public auction, according to law, to the highest bidder for cash, lawful money, when John W. Kerr being the highest, therefore the said premises were struck off by me to the said John W. Kerr for the sum of fifteen thousand (15,000) dollars, which was the highest sum bid and the whole price paid, and which I acknowledge to have received; that I delivered to said purchaser a certificate of said sale, and filed a duplicate thereof in the office of the county recorder of said county of Salt Lake, Utah, having reserved the accrued costs and expenses of said sale, amounting to $105.50, and applied the remainder of the proceeds aforesaid, viz, $14,894.50 toward the satisfaction of said judgment in favor of said plaintiff, amounting to $19,834.50;
80 there is left due and unpaid to said plaintiff, $4,940, and interest from the date of said sale.

WILLIAM NELSON,
United States Marshal.
By A. K. SMITH,
Deputy.

September 21st, 1876.
September 26th, 1876.

Order of sale.

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION), plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, defendants.

The people of the Territory of Utah to the U. S. marshal for said Territory, greeting:

Whereas Wells, Fargo & Co. and Samuel Neslin received a judgment and decree against Charles F. Smith in an action wherein the said Wells, Fargo & Co. was plaintiff, and the said Charles F. Smith and Samuel Neslin, defendants, which said judgment is recorded in record book C, judgment book of said court, and which is in the words and figures following, to wit:

First. This cause having been brought on to be heard upon the complaint filed therein taken, as confessed by the defendant, Charles F. Smith (whose default for not answering thereto has been duly entered), and upon the answer and cross complaint plead thereto by the defendant, Samuel Neslin, and upon due proof of the filing of notice of the pendency of this action containing the names of the parties to
81 and the object of the action and a description of the property affected thereby upon the 16th day of March, A. D. 1875, in the office of the county recorder of Salt Lake County, where said property is situated, and recording the same in said recorder's office, and upon the report of referee E. T. Sprague, which report is filed herein and hereby confirmed, and the court having heard the proofs necessary to enable it to render judgment herein, and the court having made and filed its findings of facts and conclusions of law herein, and it appearing, therefore, that there is now due to said plaintiff from said defendant Charles F. Smith for principal and interest upon the debt and mortgage men-

tioned and set forth in the complaint the sum of nineteen thousand three hundred and forty-nine dollars and fifty cents ($19,349.50), with interest from this date at the rate of 1½ per cent. per month and costs of suit taxed at $291.50, and that all the allegations in the said plaintiff's complaint contalned are true; and it further appearing to the court that there is now due to said defendant Samuel Neslin from said defendant Charles F. Smith for principal and interest, eleven thousand and three hundred and five dollars ($11,305), which sum is to bear interest from the date hereof at the rate of one and a half per cent. per month and the sum of $301 as attorneys' fees herein.

Second. Now on motion of Marshal & Royle, of counsel for the plaintiff, it is adjudged and decreed that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs in the suit and expenses of sale, as also the amount due from defendant Smith to defendant Neslin, together with interest thereon, attorneys' fees and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the United States marshal for the Territory of Utah; that said sale be made in the city and county of Salt Lake, at the south front door of the county court-house; that the said marshal give public notice of time and place of such sale according to the course and practice of the court and the law relative to sales of real estate under execution, and that the plaintiff, or any of the parties to this suit, may become the purchasers at such sale, and that the said marshal after the time allowed by law for
82 redemption has expired execute a deed to the purchaser or purchasers of the mortgaged premises at said sale.

Third. That the said marshal out of the proceeds of said sale retain his fees, disbursements and commissions on said sale, and pay to the plaintiff (or its attorneys) out of said proceeds its costs in this suit taxed at two hundred and ninety-one dollars and fifty cents ($291.50) and also the amount so found due as aforesaid with interest thereon at the rate of one and a half per cent. per month from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same, and out of the balance, if any there be, he shall pay to the defendant (Samuel Neslin or his attorney) the amount found due from said C. F. Smith to said Neslin, together with interest thereon as aforesaid, attorney's fees and costs, or so much thereof as the said balance will pay.

Fourth. That the defendants, and all persons claiming, or to claim from or under them, and all persons having liens subsequent to said mortgage, from C. F. Smith to John W. Kerr, sued on by plaintiff, by judgment or decree upon the land described in said mortgage, and they or their legal representatives, and all persons having any lien or claim, by or under such subsequent judgment or decree, and their heirs and personal representatives and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs and personal representatives and all persons claiming to have acquired to any estate or interest in said premises, subsequent to the filing of said notice of the pendency of this action, with the recorder as aforesaid, be forever barred and foreclosed, of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said marshal's deed.

Fifth. And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises, on such sale, be let into posses-

sion thereof, and that any of the parties to this action, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, have come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the marshal's deed for such premises, or any part thereof.

83 Sixth. And it is further adjudged and decreed that if the monies arising from said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with the interest and costs and expenses of sale as aforesaid, the marshal specify the amount of such deficiency and balance due to plaintiff in his return of said sale, and that on the coming in of said return a judgment of this court shall be docketed for such balance against the defendant Charles F. Smith, and that the defendant Charles F. Smith, who is personally liable for the judgment of the debt, secured by the said mortgage to the said plaintiff, the amount of such deficiency and judgment, with interest thereon, at the rate of one and one half per cent. per month from the date of said last-mentioned return and judgment, and that the plaintiff have execution therefor.

Seventh. And if the monies remaining after the payment of plaintiff's debt, interest and costs be insufficient to pay the amount, if found due from defendant C. F. Smith to defendant Samuel Neslin, his attorneys' fees, interest, and cost, the marshal specify the amount of such deficiency and balance due from said C. F. Smith to defendant Samuel Neslin, in his return of said sale, and that on the coming in of said return a judgment of this court shall be docketed for such balance against the defendant Charles F. Smith, and that defendant Charles F. Smith, who is personally liable for the payment of the debt to said Samuel Neslin, pay to the said Samuel Neslin the amount of such deficiency and judgment, with interest thereof at the rate of one and one-half per cent. per month from the date on said last-mentioned return and judgment, and that the defendant Neslin have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of the decree, so far as the same can be ascertained from the mortgage above referred to, or from the complaint filed in this action, are as follows, to wit:

That certain piece or parcel of land situate, lying, and being in Salt Lake City, in the county of Salt Lake and Territory of Utah, described as follows, to wit: Being lot two (2), in block thirteen (13), plat

84 D of the Salt Lake City survey, the said lot being situate on the corner of South Temple street and Walnut street in said city, county, and Territory.

August 1st, 1876.

M. SCHAEFFER,
Judge of the Third District Court, Utah Territory

Now, therefore, you, the said marshal, are hereby commanded and required to proceed to notice for sale, and to sell the premises heretofore described, and to apply the proceeds of such sale to the satisfaction of said judgment, with the interest thereon and costs, together with your fees, and to make and file your return of such sale to the clerk of the said district court within 60 days from the date hereof, and to do all things according to the terms and requirements of the said judgment, and the provisions of the statute in such case made and provided.

Witness the Hon. Michael Schaeffer, judge of the district court of the third judicial district of the Territory of Utah and the seal of said court this 29th day of August, A. D. 1876.

[SEAL] C. S. HILL, *Clerk*,
By W. P. M. BRIDE,
Deputy Clerk.

Balance costs, $11.50; accruing costs, $2.50—$14.00.
Filed September 26th, 1876.

C. S. HILL, *Clerk.*

85 *Reasons for overruling motion for new trial.*

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants,

OCTOBER 18TH, 1876.

Motion for a new trial submitted to the court and the same being by the court duly considered, the said motion is by the court overruled, to which the defendants by their attorneys then and there excepted; and the court gives the following general reasons for overruling said motion for a new trial, to wit: No error appears, to the court, in the proceedings, findings, or decree of the record of this cause.

M. SCHAEFFER,
Judge of the 3rd District Court, Utah Territory.

Filed October 19th, 1876.

C. S. HILL, *Clerk.*

Notice of Appeal.

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION),
plaintiff,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN,
defendants.

86 You will please take notice that Samuel Neslin, one of the defendants in the above entitled action hereby appeals to the supreme court of this Territory, from the judgment and decree therein made and entered in the said district court on the first day of *of* August, A. D. 1876, in favor of the plaintiff in said action and against said defendant, and from that part being against said defendant; and said *defendants, and from that part being against said* defendant, also hereby appeals to said supreme court from the order made and entered in said action by said district court on the 18th day of October, A. D. 1876, overruling said defendant's motion for a new trial and from the whole thereof.

February 12th, 1877.

JAMES N. KIMBALL,
Attorney for Defendant and Appellant Neslin.

To the clerk of said district court, and Messrs. Marshall & Royle, attorney for plaintiff and respondent.

Defendant Neslin's notice of appeal.

TERRITORY OF UTAH,
County of Salt Lake, ss:

James N. Kimball, of lawful age, being duly sworn, deposes and says that he is the attorney for Samuel Neslin, one of the defendants in the within entitled action; that he served the within notice of appeal on Messrs. Marshall & Royle, the attorneys for the plaintiff, on the 1st day of February, A. D. 1877, by delivering a copy thereof to Jonathan C. Royle, one of the members of said firm of Marshall & Royle, at their office in Salt Lake City, Utah.

JAMES N. KIMBALL.

Subscribed and sworn to this 1st day of February, 1877, before me.
C. S. HILL, *Clerk.*

Filed February 1st, 1877.

C. S. HILL, *Clerk.*

87 *Undertaking on appeal.*

In the district court for the third judicial district of Utah Territory.

WELLS, FARGO & CO. (A CORPORATION), PLAINTIFF,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, DEFENDANTS.

Whereas Samuel Neslin, one of the defendants in the above entitled action, is about to appeal to the supreme court of the Territory of Utah, from a judgment and decree entered against him in said action, in said district court, and in favor of the plaintiff in said action, on the day of August, 1876, barring and foreclosing him of all equity of redemption or right, title, and interest in and to the property in said judgment and decree described, and from every part of said judgment and decree, so far as the same is against him:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, George M. Ottinger and John Sharp, jr., of the city and county of Salt Lake, and Territory of Utah, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding one hundred (100) dollars, to which amount we acknowledge ourselves jointly and severally bound.

[SEAL.] GEORGE M. OTTINGER.
[SEAL.] JOHN SHARP, JR.

Dated this 3rd day of February, A. D. 1877.

TERRITORY OF UTAH,
County of Salt Lake:

George M. Ottinger and John Sharp, jr., the persons named in,
88 and who subscribed, the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amount specified in such undertaking as the penalty

thereof, over and above all his just debts and liabilities, exclusive of property excempt from execution.

GEORGE M. OTTINGER.
JOHN SHARP, JR.

Subscribed and sworn to this 3rd day of February, A. D. 1877, before me. [SEAL.] JAMES N. KIMBALL,
Notary Public.

TERRITORY OF UTAH,
Salt Lake County, ss:

I, C. S. Hill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true and correct copy of the original complaint, summons and return thereon, stipulation extending time, answer and cross-complaint of defendant Neslin, summons and return thereon, exhibits "A," "B" and "C," order of reference, report of referee, E. T. Sprague, notice of intention to move for new trial, statement on motion for new trial on part of defendant Neslin, order of sale and return thereon, notice of appeal, reasons for overruling motion for new trial, and undertaking on appeal, in the above entitled action filed in my office.

Witness my hand and the seal of said court at Salt Lake City, this 26th day of June, A. D. 1877.

C. S. HILL, *Clerk.*
B. P. HILL, *Deputy Clerk.*

Transcript filed in my office this 14th day of January, A. D. 1878.
E. T. SPRAGUE, *Clerk.*

89 And thereafter at a term of said supreme court of Utah Territory, begun and held at Salt Lake City on the 14th day of January, A. D. 1878, proceedings were had in said court, and in said cause, and entered on the records of said court, as follows, to wit:

THURSDAY, *January 31st, A. D.* 1878.

A session of the supreme court of the Territory of Utah was held this day, beginning at ten o'clock a. m.

Present, all the justices, the clerk, marshal, and members of the bar. Court was duly opened, and the record of the last session read and signed.

* * * * * * *

WELLS, FARGO & CO., RESPONDENTS,
vs.
CHARLES F. SMITH ET AL., APPELLANTS. } From 3d dist.

This cause, coming on regularly for hearing, was argued by J. N. Kimball, esq., for appellant; T. Marshall and C. W. Bennett, for respondents, and J. G. Sutherland, in reply; submitted and taken under advisement by the court.

90 And afterwards, at a term of said supreme court of Utah Territory, begun and held at Salt Lake City on the 3d day of June, A. D. 1878, proceedings were had in said court and cause, and entered in the records of said court, as follows, to wit:

SATURDAY, *August 17th, A. D.* 1878.

A session of the supreme court of Utah Territory was held this day,

beginning at 11 o'clock a. m., pursuant to adjournment. Present, all the justices, the clerk, deputy marshal, and members of the bar. The court was duly opened, and record of last session read and signed.

WELLS, FARGO & CO., RESPONDENTS,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, APPELLANT. } From 3d dist.

This cause having been argued and submitted at the last term of this court, and the court being now sufficiently advised thereupon, it is now here ordered and adjudged that the judgement of the district court therein be and the same is hereby affirmed, with costs.

91 Also—

WELLS, FARGO & CO., RESPONDENTS,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, APPELLANT. } From 3d dist.

On application of J. N. Kimball; esq., for appellant, ordered that the bond on appeal of this cause to Supreme Court of the United States be in the penal sum of five hundred dollars, and thereupon such appeal was prayed and allowed.

92 And on said 17th day of August, A. D. 1878, was filed in the office of the clerk of said supreme court of Utah Territory the opinion of said court in said cause, and also the dissenting opinion of Hon. P. H. Emerson, one of the justices thereof, of which opinion and dissenting opinion, and endorsements thereon, the following is a copy, to wit:

93 In the supreme court of Utah Territory, adjourned June term, 1878.

WELLS, FARGO & CO, RESPONDENTS,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, APPELLANTS. }

Appeal from 3d district court.

BOREMAN, justice, delivered the following:

Defendant Smith bought of appellant Neslin a parcel of ground in Salt Lake City. He paid a portion of the purchase money and gave Neslin a mortgage to secure the residue, and Neslin gave him the possession. Some months afterwards Smith became indebted to the respondents for $17,000, and they desired security. He asked Kerr to endorse for him, offering to secure Kerr in part by mortgage on the property referred to, claiming that there were no liens or other encumbrances on it. Smith had now been occupying the property for some months and the record showed the title to be in him, the Neslin mortgage not having been recorded or filed for record, nor did Kerr know
94 of its existance.

Under these circumstances Kerr endorsed the note of Smith for $17,000, and Smith afterwards complied with his agreement by giving his note to Kerr for $13,000 and giving a mortgage on the property to secure Kerr the payment of the note. The residue of the $17,000 was otherwise secured. Kerr had his mortgage recorded, and thereafter, on the same day, the appellant Neslin had his mortgage also recorded.

Kerr transferred this note and mortgage which he had received from Smith to respondents. Smith having failed to pay the amount secured thereby, the respondents bring their suit to foreclose.

Default was entered against Smith, who never appeared to the action; but Neslin filed answer, setting up his mortgage and claiming that it was entitled to priority over the Kerr mortgage, &c. The court below gave judgement for respondents, and thereupon Neslin appealed to this court.

95 The mortgagees, in both of these mortgages acted in good faith in taking their respective mortgages.

The appellant maintains that the note in question was given to indemnify the payee therein against loss upon another note; that no loss has occurred, and that therefore no cause of action exists on the note thus given to indemnify.

This is plausable upon its face, but we do not think that it is the law. It seems to be indisputably settled that an endorser, holding securities from the maker of the note, may transfer these securities to the payee, who can, upon failure to pay the note endorsed, proceed to make the money out of the securities before suing upon the note. If such securities happen to be other notes and mortgages this does not change the rule. (1st Hilliard on Mortgages, p. 345.)

In the case before us the evidence shows that the $17,000 was not paid. The payees of that note, therefore, had the right to exhaust the security delivered to them by the endorser before proceeding upon
96 the note. It was not necessary for Kerr to pay the original note of $17,000 before this could be done.

Kerr acted in good faith in taking the note and mortgage. They were to secure him against loss. His endorsement of the $17,000 note was a valuable consideration, and the endorsement and the giving of the mortgage were intended to, as parts of one and the same transaction, to be performed at the same time. That there was delay in the execution of the mortgage was not due to anything that Kerr did. He gave no extension of time, and their arrangement contemplated no delay. The mortgage therefore was not given to secure an antecedent debt as understood in the books. There was no subsequent arrangement to give security for a past consideration. Bona-fide purchasers, without notice, are favored in equity. (Story eq. Juris., §§ 108, 165, 381, 434, 436.)

It is claimed that the Neslin mortgage, being of prior date to
97 the one sought to be foreclosed, should have the priority. If no other question than that of the date were involved in settling the priority the Neslin mortgage would take precedence. But there is another question. Neslin waited a year after receiving his mortgage before he put it upon record. The Kerr mortgage had then been recorded. The appellants however maintain that the recording made no difference, as no statute required it. Neslin deemed it advisable, after the other mortgage had been recorded, to have his also, on the same day, recorded.

At common law, down to the time of Charles the Second, no writing was necessary to pass title to lands, but the form of conveyance was by

an actual or symbolical livery of seizen. Afterwards, in carrying out the intention of the parties, it became customary to make written deeds, but these did not obviate the necessity of livery of seizin. (3 Washburn's Real Property, 603-4.)

This livery of seisin was necessary, in order "to prevent sub-
98 sequent and fraudulent pledges of the same land" (2 Bl. Com., 160), and it was retained as a public and notorious act, that the country might take notice of the transfer of the estate. (2 Bl. Com., 311.)

Afterwards the system of recording was adopted, to take the place of livery of seisin, and it is recognized as having the same effect. (Bouvier's Law Dic., title, Livery of Seisin.) But in most of the States registration is not essential to passing the estate, but, as a substitute for livery of seisin, it is only intended to give notice. (1 Gr. Ev., § 573, note 3.)

In this country the recording of deeds has generally taken the place of livery of seisin, and the latter has been dispensed with either by usage or by statute. (1 Washburn's Real Property, 14-15.)

In Utah livery of seisin is unknown. No statute has expressly abolished it, but by usage it is dispensed with. Why dispensed with? Simply because the public have recognised the recording system as its substitute.

99 The Territorial statutes in force at the time of the execution of the mortgages in question authorized the recording of such papers, but did not require it, just as Greenleaf, as above quoted, says is the rule in most of the States. Our Territorial statutes required the establishment of recorders' offices in every county, and required record-books to be kept therein, in which the recorders should record deeds and other writings. (Compiled Laws of Utah, § 216 to 219.) These books were open for the recording of mortgages, as well as other transfers, and they were of the character of public official registers. (1 Greenleaf's Ev., § 496.) And such books are, as the law says, entitled to an extraordinary degree of confidence, and are admissible in evidence by reason of the credit due to the officer, and of the public nature of the documents themselves. (1 Gr. Ev., § 483.)

It would seem, therefore, that they were of sufficient importance to put parties upon inquiry as to their contents, and to give constructive
100 notice of what was upon record. Constructive notice exists when a party, by any circumstance whatever, is put upon inquiry. (Bouvier's Law Dic., title, "Notice.") At the times the mortgages in question were executed, it was a common thing, one of public notoriety, to record mortgages and other conveyances, and the fact that there were officers in each county for the purpose of making such recordations, was also a matter of public notoriety. Under such circumstances, it would seem that common prudence would have dictated to Neslin that his mortgage should be recorded, and thus, as far as he could, give public notice of his lien. Such recording would have been constructive notice to Kerr, and this contest would have been avoided.

The American doctrine, "universally held, is that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property." (Story's Eq. Juris., §§ 401-2-3-4; 4 Kent's Com., 174—side page—N. "A.")

101 Neslin failed to give such constructive notice. He was therefore negligent of his duty, and his lien should be postponed to the subsequently acquired rights of respondents. His equity was not

equal to that of the other mortgagee, and his own negligence has lost him his precedence. (Bayley vs. Greenleaf, 7 Wheat., 46.)

We are therefore of the opinion that the judgement of the court below was right, and it is therefore affirmed, with costs.

I concur herein.

M. SCHAEFFER, *C. J.*

(Indorsed :) In supreme court of Utah, August, 1878. Wells, Fargo & Co., resp'd'ts, vs. Samuel Neslin and C. F. Smith, appellant. Opinion by Boreman, justice. Filed Aug. 17th, 1878. E. T. Sprague, clerk.

102 Utah Territory supreme court.

Case heard at January term, 1878; decided Aug. 5th, 1878.

WELLS, FARGO & CO., RESPONDENTS,
vs.
CHARLES F. SMITH AND SAMUEL NESLIN, appellant.

I am unable to agree with a majority of the court in this case, and file the following reasons for dissenting therefrom :

On the 5th day of July, 1873, the defendant Smith made a note—$17,107.00—the amount of his indebtedness to the respondents—payable to the order of John W. Kerr, sixty days after date. Kerr endorsed the note for Smith's accommodation, Smith then promising to execute afterwards a mortgage for Kerr's indemnity. The note and mortgage on which this action was brought were made by Smith, at Kerr's request, on the 27th of September following, for the purpose of such indemnity.

Although the note, to which the mortgage sought to be foreclosed by this action is collateral, contains an absolute promise to pay
103 $13,000.00 sixty days after date, yet it could not, between the immediate parties, have been enforced, except on the happening of a loss against which it was intended as a security. The law is now well settled that, however absolute a deed or other instrument, it may be shown by parol to have been intended as a security. (Atwater vs. Emerson, 7th Mich., 12; Strong vs. Stewart, 4 John. Ch., 167; Ryan vs. Walker, 1st Wis., 527; 6 John. Ch., 417: 46 N. Y., 609; 2d Wharton Ev., sec. 1031-2.)

Between Smith and Kerr the sum stated in the note is like a penalty with a parol condition or defeasance to pay any loss Kerr might sustain by reason of the endorsement.

The second finding of the court below is :

"That the consideration for the note and mortgage sued on by the plaintiff was the endorsement by John W. Kerr of a certain note, made by the defendant, Charles F. Smith, on the 5th day of July,
104 A. D. 1873, for the sum of $17,107.10, which note was made payable to said Kerr in 60 days from date, and was to bear interest at the rate of one and one-half per cent. per month, and that said Kerr endorsed said $17,107.10 note on the 5th day of July, A. D. 1873, upon the request of said Smith, and upon his promise to execute and deliver to him the note and mortgage sued on by the plaintiff, as part of one and the same agreement."

There is no evidence in the record that any note was promised, nor that any mortgage was to be made, except for Kerr's indemnity. The

note and mortgage which were made did not, therefore, literally conform to the agreement, and the last clause of the finding appears to be entirely unsupported by proof. Had Smith merely given a mortgage conditioned to save Kerr harmless, and this finding had referred solely to such a mortgage, it would have been correct; but this finding does not notice the conditional nature and effects of the instruments
105 in their inception; they are treated as being legally absolute, according to their face, as though they were valid and binding when made, for the payment of $13,000.00 in sixty days. When they were made in September, there was a sufficient executed consideration to support a mortgage for Kerr's contingent loss, and it does not appear that Smith or Kerr intended the securities to have any other operation.

Hence the finding above quoted does not accurately state the transaction as disclosed by the evidence.

The answer of the appellant Neslin truly sets forth the consideration and purpose for which those instruments were made, and that the respondents had notice thereof. The respondents are found to be entitled to have judgement according to their literal reading; that is, for principal and interest from date, as for an actual debt. Kerr would not be entitled to such a judgement, nor would the respondents, except on the footing of a bona fide holder. On that subject there is no find-
106 ing, and obviously for the reason that the court below treated the note and mortgage as absolute in their inception, in the hands of Kerr, as well as in the hands of respondents; hence it is apparent that the respondent obtained judgement without being required to show the bona fides of their purchase.

The error of law and fact in the second finding led to this result, and this alone would necessitate a reversal; for there is a recovery where no cause of action existed between the original parties, and in the absence of any fact found, which would give the respondent a right of action when none existed, in favor of Kerr. But other points remain to be considered.

The mortgagor makes no defence, but Neslin, who is made defendant on the general allegation that he has, or claims to have, some interest in or claim on the mortgaged premises, answers the complaint and sets up an earlier mortgage, given November 27, 1872, by the same
107 mortgagor, for $7,000.00, shown by the evidence to be purchase money of the mortgaged premises. It bears interest from March 1, 1873, at the rate of one and one-half per cent. per month until paid, and secures also $300.00 attorneys fees, amounting, at the time this decision is made, Aug. 5th, 1878, in all to $14,037.50. This mortgage is held by the court below to be subsequent and subordinate to the mortgage held by the respondent. It will be noticed that it is prior in date; and this fact gives the holder a right to prior satisfaction, unless his lien is intrinsically defective, or unless he has done some act, or is guilty of some neglect which, by law or equity, has the effect to postpone him. (Rankin vs. Scott, 12 Wheat., 177.)

The only ground on which it is claimed that Neslin lost priority, is his omission to record his mortgage until after the mortgage held by the respondents had been made and recorded. To determine that
108 this omission has this postponing effect, we must hold that he was under a legal or equitable obligation to record his mortgage, and that the respondents are in a situation to claim preference on account of the neglect.

It is conceded that in 1872–3 there was no statute in this Territory which expressly required the recording of mortgages, and none which

equal to that of the other mortgagee, and his own negligence has lost him his precedence. (Bayley vs. Greenleaf, 7 Wheat., 46.)

We are therefore of the opinion that the judgement of the court below was right, and it is therefore affirmed, with costs.

I concur herein.

M. SCHAEFFER, *C. J.*

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102 Utah Territory supreme court.

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Although the note, to which the mortgage sought to be foreclosed by this action is collateral, contains an absolute promise to pay
103 $13,000.00 sixty days after date, yet it could not, between the immediate parties, have been enforced, except on the happening of a loss against which it was intended as a security. The law is now well settled that, however absolute a deed or other instrument, it may be shown by parol to have been intended as a security. (Atwater vs. Emerson, 7th Mich., 12; Strong vs. Stewart, 4 John. Ch., 167; Ryan vs. Walker, 1st Wis., 527; 6 John. Ch., 417: 46 N. Y., 609; 2d Wharton Ev., sec. 1031-2.)

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106 ing, and obviously for the reason that the court below treated the note and mortgage as absolute in their inception, in the hands of Kerr, as well as in the hands of respondents; hence it is apparent that the respondent obtained judgement without being required to show the bona fides of their purchase.

The error of law and fact in the second finding led to this result, and this alone would necessitate a reversal; for there is a recovery where no cause of action existed between the original parties, and in the absence of any fact found, which would give the respondent a right of action when none existed, in favor of Kerr. But other points remain to be considered.

The mortgagor makes no defence, but Neslin, who is made defendant on the general allegation that he has, or claims to have, some interest in or claim on the mortgaged premises, answers the complaint and sets up an earlier mortgage, given November 27, 1872, by the same
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The only ground on which it is claimed that Neslin lost priority, is his omission to record his mortgage until after the mortgage held by the respondents had been made and recorded. To determine that
108 this omission has this postponing effect, we must hold that he was under a legal or equitable obligation to record his mortgage, and that the respondents are in a situation to claim preference on account of the neglect.

It is conceded that in 1872–3 there was no statute in this Territory which expressly required the recording of mortgages, and none which

defined the consequences of an omission to record, nor what advantages any other mortgage would derive by superior diligence in recording such securities.

A recorder's office had long been established under Territorial statutes, and the recording of certain instruments other than mortgages was expressly provided for, and, to some extent, regulated. The testimony also shows that there were record books kept for the recording of mortgages; that mortgages were in fact recorded, but no uniform or even general custom to record them. Under these circumstances
109 it cannot be held that there is a statutory requirement to record as a part of the ceremony of creating a valid incumbrance; nor is any such claim made. It is well settled that recording acts apply only to such instruments as the law, by general or special terms, requires to be recorded; and statutes which are only permissive in their language, and which do not declare the record to be notice, are not mandatory, and the record will have no other effect than that prescribed. (Boyd vs. Schlessinger, 59 N. Y., 301. Cook vs. McChristian, 4th Cal., 23. Farmers & Mechanics' Bank vs. Brunson, 14th Mich., 361.)

The respondent's claim on this point is, that there being a recorder's office, and a usage to record mortgages, the appellant was wanting in diligence; but unless the statute made the record notice, the party recording it would derive no advantage from its being recorded, and no subsequent purchaser or incumbrancer would be affected by it. It may, however, be contended that, if a mortgage is recorded, a party
110 dealing with the property afterwards would be warned by actual inspection of the record, and therefore Neslin, by omitting to record his mortgage, withheld information which it was his duty in this way to communicate, and should now be estopped from asserting a prior lien, which he failed to disclose, to the prejudice of a subsequent mortgagee having no knowledge of it. The requisite facts do not appear in such a case to create an equitable estoppel. There being no duty to record the mortgage, there was no silence when there was a duty to give information.

In this case, however, it does not appear that either Kerr or the respondents suffered any prejudice at all as the consequence of Neslin's failure to record his mortgage. Neither appear to have consulted or acted upon the record. Kerr did the act against which the mortgage was given as an indemnity on Smith's promise to give a mortgage, and on his assurance that the property was unincumbered. The diligence, therefore, which the respondents insist upon, would have been
111 unavailing, and, consequently, the want of it not detrimental.

Unrecorded instruments are good, even under recording laws, between the parties, and they are good as against all others who are not expressly exempted from their effect. No party can be exempted in this Territory, under the laws existing prior to 1874, except upon equitable grounds; but in equity one party cannot obtain relief against another for not doing an act which he was under no obligation to perform, nor unless it appears that not doing it was injurious.

If a statute prescribed that an unrecorded mortgage should be void as against a subsequent purchaser or mortgagee for value, without notice, the court would have no option but to pronounce accordingly when such a case is presented. But in the absence of such a statute, a court is not warranted in holding an unrecorded mortgage void
112 when it does not appear that the record was consulted, nor that any subsequent dealing with the property was at all influenced by the state of the record.

Recording acts are intended to protect only bona fide purchasers and incumbrancers who have paid value. Neither Kerr nor the respondents are entitled to any preference in that character.

"The term bona fide purchaser is borrowed from equity jurisprudence and must be interpreted accordingly; and it is well settled that a grantee or incumbrancer who does not advance anything at the time, takes the interest conveyed subject to any prior equity attaching to the subject." (Wood vs. Robinson, 22 N. Y., 564.) A good consideration in a general sense is not sufficient. (Weaver vs. Borden, 49 N. Y., 291.) Neither a past consideration, as a precedent debt, when there is no change in the debt, surrender of securities or the like. (Weaver vs. Borden, 49 N. Y., 286. Cary vs. White, 52 N. Y., 138). Nor an executory consideration to be paid on performance in the future. (Wormly vs. Wormly,
113 8 Wheat., 421; Dixon vs. Hill, 5 Mich., 404; Warner vs. Whittaker, 6 Mich., 133; Blanchard vs. Taylor, 12 Mich., 339; Stone vs. Welling, 14 Mich., 514.) Value must be paid at the time on the faith of the purchase or the security.

When the mortgage to Kerr was made he paid nothing; he had already endorsed for Smith relying on his verbal promise of security. (See Dusenbury vs. Halbert, 59 N. Y., 541.)

The testimony fails to satisfy us that when the note and mortgage were delivered to the respondent there was any granting of time or other contemporaneous consideration; they were delivered simply as collateral security for a debt which the respondents deemed already well secured.

There is no more reason to suppose that the delay for the first sixty days, any more than for the ensuing five months, was by agreement, based on the receipt of this mortgage.

In my opinion, the decree should be modified so far as it determines that the respondents' mortgage is entitled to priority. It should
114 be so modified as to require the application of the proceeds of the sale, first, to pay the costs of the appellant in this court and in the court below, with the costs of sale; second, the amount due to the appellant Neslin on his said mortgage; and third, the respondents' mortgage and their costs.

PHILIP H. EMERSON,
Asso. Justice.

(Indorsed:) Supreme court. Wells, Fargo & Co., respondents, vs. Smith & Neslin, appellants. Dissenting opinion of Emerson, A. J. Filed Aug. 17, 1878. E. T. Sprague, clerk.

115 And afterwards, on the 26th day of August, A. D. 1878, was issued and *and* filed a citation, pursuant to the appeal of said cause to the Supreme Court of the United States, of which citation and proof of service thereof the following is the original, to wit:

116 UNITED STATES OF AMERICA, *ss:*

To Wells, Fargo & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to an appeal taken from the supreme court of the Territory of Utah, wherein Samuel Neslin, impleaded with Charles F. Smith, is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. Schaeffer, chief justice of the supreme court of Utah Territory, this 26th day of August, in the year of our Lord 1878.

MICHAEL SCHAEFFER,
Chief Justice of the Supreme Court of Utah Territory.

117 (Indorsed:) In the Supreme Court of the United States. Samuel Neslin, impleaded with Charles F. Smith, appellant, vs. Wells, Fargo & Co., appellee. Citation.

Received service of this citation by copy delivered to us this 26th day of August, 1878.

MARSHALL & ROYLE,
Attorneys for .

Filed Aug. 26th, A. D. 1878.

E. T. SPRAGUE,
Clerk Sup. Court.

118 And on said 26th day of August, A. D. 1878, was filed in the office of the clerk of said supreme court of Utah Territory a bond on appeal of said cause, of which the following is a copy, as well as of endorsements thereon, to wit:

119 In the Supreme Court of the United States.

SAMUEL NESLIN, IMPLEADED WITH CHARLES F. SMITH, appellant,
vs.
WELLS, FARGO & CO., APPELLEE.

Know all men by these presents that we, Samuel Nelson, of the city and county of Salt Lake, and Territory of Utah, as principal, and George M. Ottenger and Robert F. Neslin, of the same city, county, and Territory, as sureties, are held and firmly bound unto the above-named Wells, Fargo & Co., in the sum of five hundred ($500) dollars, to be paid to the said Wells, Fargo & Co., its successor or successors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated the twenty-sixth day of August, A. D. 1878.

Whereas the above-named Samuel Neslin hath taken an appeal
120 to the Supreme Court of the United States to reverse the judgement rendered in the suit of Wells, Fargo & Co., respondents, against Samuel Neslin, impleaded with Charles F. Smith, appellant, by the supreme court of the Territory of Utah:

Now, therefore, the condition of this obligation is such, that if the above-named Samuel Neslin shall prosecute his said appeal, and answer all costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL NESLEN. [SEAL.]
G. M. OTTENGER. [SEAL.]
R. F. NESLEN. [SEAL.]

Signed, sealed, & delivered in presence of—
JAMES N. KIMBALL.

TERRITORY OF UTAH,
County of Salt Lake, ss:

George M. Ottenger and Robert F. Neslen, being severally duly sworn, each for himself and not one for the other, deposes and says that
121 he is one of the sureties in the foregoing bond; that he is worth the amount specified in said bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

G. M. OTTENGER.
R. F. NESLEN.

Subscribed & sworn to this 26th day of August, 1878, before me.
[SEAL.] JAMES N. KIMBALL,
Notary Public.

(Indorsed:) In the Supreme Court of the United States. Samuel Neslin, impleaded with Charles F. Smith, vs. Wells, Fargo & Co. Appeal bond.

Approved August 26th, 1878.

MICHAEL SCHAEFFER,
Chief Justice of the Supreme Court of Utah Territory.

Filed August 26th, A. D. 1878.

E. T. SPRAGUE,
Clerk Sup. Court.

SUTHERLAND & KIMBALL,
Att'ys for Appellant.

122 TERRITORY OF UTAH,
Salt Lake County, ss:

I, E. T. Sprague, clerk of the supreme court of said Territory, in pursuance of said appeal, do hereby return to the Supreme Court of the United States the foregoing transcript of the record and proceedings of and in the supreme court of said Territory; of the opinion of said last-named court, and dissenting opinion of one of the justices thereof; and of the bond on appeal, together with the original citation and proof of service thereof, all in the cause in said citation mentioned and entitled; and I hereby certify that said transcript of the record and proceedings, said two opinions, and bond, is a true, correct, full, and complete copy of the several originals thereof, on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of Utah Territory this day of September, A. D. 1878.

[SEAL.] E. T. SPRAGUE,
Clerk of the Sup. Court of Utah Territory.

(Indorsement on cover:) No. 344. Samuel Neslin, impleaded with Charles F. Smith, appellant, vs. Wells, Fargo & Company. Utah Terr'y sup. court. Filed 23d November, 1878.

SUPREME COURT U.S.
FILED
OCT 24 1981

APPELLANT'S BRIEF.

SUPREME COURT
OF THE
UNITED STATES.

SAMUEL NESLIN,
Impleaded with
CHARLES F. SMITH,
Appellant,
vs.
WELLS, FARGO & CO.

J. G. SUTHERLAND,
AND
J. R. McBRIDE,
Attorneys for Appellant.

SUPREME COURT

OF THE

UNITED STATES.

SAMUEL NESLIN,
Impleaded with
CHARLES F. SMITH,
Appellant,
vs.
WELLS, FARGO & CO.

STATEMENT OF FACTS.

Wells, Fargo & Co., the Plaintiffs below, filed complaint to foreclose a mortgage made by Charles F. Smith to John W. Kerr, bearing date September 27th, 1873. The mortgage was, according to its terms, made to secure the payment of Smith's note of the same date, for $13,000, and interest at the rate of one and a half per cent. per month, payable to Kerr's order sixty days after date.

The complaint alleges that before maturity the note was endorsed for value and delivered to the plaintiffs; that they are the holders and owners of said note and of the mortgage; that the mortgage was recorded in the office of the County Recorder on the 6th day of October, 1873.

The complaint also alleges that Defendant Neslin, the Appellant, has, or claims to have, some interest in, or

claim upon the mortgaged premises, as mortgagee or otherwise, "*which interest or claim is subsequent to* and subject to the lien of the plaintiff's mortgage."

The prayer is, first, for judgment against Smith, the maker of the note and mortgage, for the amount of the debt; second, for the usual decree for sale of the premises, that the proceeds be applied as payment of the amount due the Plaintiff, "and that said defendants and all persons claiming under them, subsequent to the execution of said mortgage, * * may be barred and foreclosed of all rights, claims or equity of redemption," and for judgment for the deficiency against Smith; and, third, that the Plaintiff, or any other parties, may become purchaser at the sale, receive deed, be let into possession, and for general relief.—*Transcript, pp. 1 and 2.*

Defendant Smith made no defense. Neslin answered, admitting the making of the note and mortgage mentioned in the complaint; but avers that they were made to indemnify Kerr against the payment of a note for a large sum of money, made by Smith and endorsed for his accommodation by Kerr, in favor of Wells, Fargo & Co., prior to the giving of the note and mortgage sued on, and without any other consideration, and for no other purpose, and that such endorsed note was still outstanding and wholly unpaid. There is a denial that the note and mortgage were transferred to Wells, Fargo & Co. for value, and it is averred that they were tranferred to them as colla eral security for Kerr's liability on said endorsement, and in no other way and for no other purpose.

The answer admits the recording of the mortgage at the date alleged in the complaint, but avers that Kerr and Wells, Fargo & Co. had notice of a prior mortgage held by Neslin for $7,000, with interest at the rate of one and a half per cent. per month and reasonable attorney fees, given by Smith to Neslin for purchase money of the mortgaged premises, and recorded also October 6th, 1873, and that they had such notice at the time of the execution of the note and mortgage sued on, and that said note and mortgage to Neslin were wholly unpaid; also that Wells, Fargo & Co. had notice of Neslin's note and mortgage before the transfer of the Kerr note and mortgage to them;

and Neslin denied that the mortgage mentioned in the complaint is a prior lien.

Neslin, by way of a counter claim, asks foreclosure of his mortgage.—*Transcript, pp. 4-6.*

Both mortgages were made part of the pleadings.—*Transcript, pp. 8-11.*

The action was tried before the District Court for the Third Judicial District of Utah Territory, on testimony taken before a referee, and judgment or decree rendered August 1st, 1876, the Court holding that the mortgage to Kerr is a prior lien, and $19,349.50 due on it, and that Neslin's mortgage is a subsequent lien, and giving data for ascertaining the amount, including attorney fees, stipulated for in the mortgage.

The particular facts found by this Court appear in the *Transcript, pp. 39 and 40.* Decree on page 41-43.

On appeal to the Territorial Supreme Court, the decree was affirmed, August 17th, 1878.—*Transcript. p. 53.*

The statement shows certain exceptions taken to the rulings in the introduction of testimony and to findings, which will appear in the assignment of errors.

ASSIGNMENT OF ERRORS.

1.—The Court below erred in affirming the admissibility of and admission in evidence of the endorsements on the mortgage mentioned in the complaint. The endorsements were as follows: "Dated September 29th, 1873. Filed for record September 29th, 1873, 8 a.m. Recorded at the request of John W. Kerr, October 6th, A.D. 1873, Record Book D of Mortgages, pages 546-7-8. Edwin D. Woolley, Recorder. Salt Lake County, U. Ter."—*Exhibit A, Answer to Complaint, Transcript, p. 10.*

2.—In affirming the ruling of the trial court allowing the witness, John W. Kerr, to answer the following: "Please state the circumstances of the execution of said note and mortgage, the consideration thereof from Smith to you moving," which he answered as follows: "On or about the 5th day of July, 1873, Charles F. Smith, one of the defendants in this case, came to me in my office, and asked

me to endorse a promissory note to Wells, Fargo & Co. for him, amounting to some $17,000, proposing to give me a mortgage on his house and lot where he then resided, and a mortgage on a lot of cattle that he had, provided that I would so endorse for him. I asked him if his said property was clear of all incumbrance. He stated to me that it was. He likewise stated that he intended to pay on the Wells, Fargo & Co. note some six or seven thousand dollars within a few days. On his assurance to me that his property was unincumbered, and that he would execute to me a mortgage on the same, I endorsed his paper for about $17,000. He never paid the $6,000 or $7,000. The note I endorsed for him was dated on or about the 5th day of July, 1873, was for over $17,000, I think. I endorsed the note on the day it bears date; said Smith in consideration thereof agreeing to execute within a few days a mortgage on said property. I called on him once or twice, I think, before leaving for the west, but he did not get the mortgage up for me until my return from the west. He then executed to me that mortgage, dated September 28th, 1873, securing a note for $13,000, sued on in this case. He handed me a note of Kimball, Wines and said Smith, of, I think, $6,000, which was taken up by Smith, and represented to me that Kimball & Wines owed on said note $4,000, on joint cattle purchase. This is all the security I received, pursuant to his promise on the cattle. I went west a short time after the endorsement of the note of $17,000, as above referred to, to Wells, Fargo & Co.. and returned from there about the 25th or 26th of September."

3.—In affirming the ruling of the trial court in allowing said witness, Kerr, to answer the following question: "For what purpose, and for what consideration, if any, did you endorse and deliver said note to Wells, Fargo & Co?" Which question he answered as follows: "For the purpose of assisting in liquidating the $17,000 note above referred to, and as collateral security therefor."

4.—The Court below erred in affirming the omission of the trial court to find upon the issue tendered by the answer that the note and mortgage sued on were given to Kerr for the sole purpose of indemnity against the pay-

ment by him of his endorsement of Smith's note, and that that endorsed note was wholly unpaid.—*See allegation in Answer, Transcript, pp. 4 and 5.*

6.—The Court erred in giving judgment for Plaintiff below, on his complaint, on proof the facts found in the "second" and "third" findings.—*Transcript, 39.*

7.—The Court erred in deciding that Wells, Fargo & Co. had a lien, under their mortgage, for the amount thereof, prior to Neslin's mortgage, the findings showing the Neslin mortgage to be prior in date and to have been given for part of the purchase money of the mortgaged premises, no facts being stated in the complaint giving Wells, Fargo & Co. an equitable or other right to priority, and no facts found on which a right to such priority could be founded.—*See 1 and 8, Findings, Transcript 39-40.*

BRIEF AND ARGUMENT.

The errors assigned entitle us to contend that the decree of the District Court, and the affirmance of it by the Utah Supreme Court, are erroneous on two grounds, first, for being based on evidence received and findings made of facts not in issue; and, second, the decree is based on an erroneous construction of the law applicable to the facts found.

On the ground first stated we specially object that contrary to the case stated, and in the absence of any allegation in the complaint to justify it, evidence was admitted and a finding made, that the plaintiff's mortgage, which was later in date than the defendant's, was first recorded, and on this fact the decree was made that plaintiff's mortgage be first satisfied. The first error assigned is the admission of the official endorsements on the mortgage stating the time when it was recorded.—*Transcript, p. 14.*

The Complaint alleges the recording of the Plaintiff's mortgage on the 6th day of October, 1873.—*Transcript, p. 2.* Although the mortgage with the endorsements thereon were made part of the complaint by an exhibit, and the endorsement was, "Dated September 27th, 1873. Filed for record September 29th, 1873, 8 a.m. Recorded

at the request of John W. Kerr, October 6th, 1873, Record Book D, of Mortgages, Pages 546-7-8. Edwin D. Woolley, Recorder," etc., that reference could not have the effect to modify the positive and direct allegation by the plaintiff of the ultimate fact that the mortgage was recorded on the 6th of October, 1873. If the complaint had stated that the Recorder made an official memorandum in the words of the endorsement, it would have no different effect than making these endorsements a part of the complaint in the manner adopted by the pleader. The complaint does not state that these endorsements are true, or that there was a filing on the 29th of September. At most that endorsement is a part of the complaint as the statement of the Recorder, and is not that of the Plaintiff. Therefore, it is purely a statement of evidence, which in pleading is surplusage. It would not avail in the absence of any other statement as an allegation of the fact which such evidence would tend to prove, and much less will it countervail a direct and positive averment of different import.

Wormonth *vs.* Hatch, 33 Cal., 128.
Moore *vs.* Murdock, 26 Cal., 514.
Canfield *vs.* Tobias, 21 Cal., 349.
Racouettat *vs.* Reni, 32 Cal., 456.

The allegation that the Plaintiff's mortgage was recorded in the Recorder's Office on the 6th day of October, 1873, was expressly admitted in the answer.—*See 4th Subdivision, Transcript, p. 5.*

The fact is thus conclusively fixed between the parties, and neither of them was at liberty to gainsay it.

Paige *vs.* Willett, 38 N. Y., 28, 31.
Robbins *vs.* Codman, 4 E. T. Smith, 325.

No proof was needed to establish it, nor was any finding required or admissible; and a finding contrary to such an admission will be disregarded.

Bennett *vs.* Stearns, 33 Cal., 468.
Bradbury *vs.* Cronise, 46 Cal., 287.
McDonald *vs.* Mission V. H. Asso., 51 Cal., 210.

The answer alleged that the mortgage to Neslin was recorded on the 6th day of October, 1873, and the Court found that it was recorded on the *29th day of September. 1873.—See 9th Finding, Transcript, p. 40.*

The Defendant, to obtain a finding on his allegation, was bound to make proof of the date, and the Plaintiff was at liberty also to offer proof. If it was a material fact, it was an issue; and therefore this finding would be conclusive. Hence, it establishes that this mortgage was first made and first recorded.

But if Neslin is held to be so far bound by his allegation that no effect can be given to the finding which states a different and more favorable date, then the question of priority, so far as affected by the time of recording the two mortgages, depends on the legal effect of recording them at the same time. Both being stated generally to have been recorded on the 6th day of October, the necessary legal inference is that they were simultaneously recorded. In such a case the recording has no effect, it neither gives nor takes away priority.

Stafford *vs.* V. Rensselaer, 9 Cow., 316, 317.

The doctrine applicable is thus stated is a late work on Mortgages: "When two mortgages, executed at different dates, are recorded on the same day, and there is nothing to show which was in fact first recorded, the presumption of law is that the recording of them was concurrent, and each party stands charged with notice of the equities of the other on that day at the same moment. In such case the mortgage which is prior in execution is regarded as having the superior equity."—*1 Jones on Mortgages, §566.*

Houfes *vs.* Schultz, 11 Chicago Leg. News, 75.
Hatch *vs.* Haskins, 17 Me., 391.

The admission of the testimony complained of in the second and third assignments of error, was evidently to establish for the Plaintiff the character of *bona fide* purchaser. Prior registry would not alone give the Plaintiffs, as holders of a junior mortgage, preference; therefore, in making out their case, in chief, they were permitted to introduce evidence for the purpose of showing that they paid value and had no notice of the Defendant's prior mortgage.

There being no allegation in the complaint of *bona fide* purchase, nor of earlier record, there was an objection to the admission of the evidence.—*Transcript p. 14.* Its admission and the making of a finding and decree based upon it, were crearly erroneous, as an infraction of the rule which confines the evidence and relief to the case made in the pleadings.

The complaint states that the Defendant Neslin has, or claims to have, some interest in or claim upon the mortgaged premises which is subsequent and subject to the Plaintiff's mortgage. This allegation does not entitle the Plaintiff to show that he is a *bona fide* purchaser in respect of his mortgage, and that this Defendant having a prior mortgage has so conducted himself in regard to it that it should be postponed and his security treated as subsequent.

Wurcherer *vs.* Hewitt, 10 Mich., 453.
Dawson *vs.* Danbury Bank, 15 Mich., 495.
Palmer *vs.* Yager, 20 Wis., 103.
Strebe *vs.* Downer, 13 Wis., 14.
Pelton *vs.* Farmin, 18 Wis., 226.
Williamson *vs.* Probasco, 8 N. J. Eq., 571.
Lewis *vs.* Smith, 9 N. Y., 514.

The mortgage of Neslin is truly set up in the answer, and is a prior mortgage. Although made the subject of a counter claim, that was unnecessary, and has no effect; nor is it new matter within the meaning of Section Sixty-five of the Utah Code.

Compiled Laws of Utah, pp. 416, 417.
Goddard *vs.* Fulton, 21 Cal., 430.

Bridges *vs.* Paige, 13 Cal., 640.
2 Estees Plead. & F., 412, 413.

Neslin, in his answer, admits that he has a mortgage, but denies that it is subsequent. His further allegation that it is prior, only affirms what is implied by his denial. The description of the mortgage merely amplifies the denial and explains what his claim is.

On the second ground we insist that the findings which have been referred to are immaterial and the decree based thereon is erroneous, because there existed in Utah when these mortgages were made, and until 1874, no law requiring mortgages to be recorded, or defining the effect of recording or the consequences of omitting to record them.

A statute passed by the Territorial Legislature in 1850 established a recorder's office in each county, and prescribed his duties. Another act relating to recorders was passed in 1855. The first required the recorder to record "all transfers or conveyances of land or tenements, and all other instruments of writing and documents suitable, necessary and proper, to be recorded in a fair and legible manner." By the other act the recorders were required to "keep books in which they shall record deeds and all other instruments of writing necessary and proper, to be recorded by letter, line and figure precisely as they occur therein, and in a fair and legible manner." These acts are included in the official compilation of the laws of the Territory, published in 1876, pages 130, 132.

By an act passed one day earlier than the above act of 1855, it was enacted by the Territorial Legislature that a transfer of a land claim, with the improvements thereon, must be substantially in a form contained in the first section, which is a very brief form of an absolute conveyance. The next two sections are as follows: "Sec. 2.—To be

valid, a transfer must be witnessed by two or more competent persons, be acknowledged before some person authorized to take acknowledgements; be recorded, and the record, page and book be certified thereon by the recorder in the county where the property is located. Sec. 3.—Other property than land claims and the improvements thereon, when disposed of by gift, must be transferred substantially in the same manner, and by specification of kind and number or amount, but unless required, the details may be omitted"—*Compilation of Utah Laws*, (*1870*) *pp. 92-3*.

This Statute obviously did not apply to mortgages: but if it did, then the Plaintiff's mortgage is not valid and the record of it is void; *for that mortgage has but one witness.*

These Statutes are those referred to in the opinions of the Territorial Supreme Court—*Transcript*, *pp. 55, 57-8*. There are no others relating to the duties of recorders, or containing any designation of instruments which should or might be recorded.

The only instruments required to be recorded are absolute transfers. And the only other requirement is addressed to recorders. Holders of mortgages and other instruments are not required to record them; no time is limited for recording; no penalty provided for failure to record, and no effect of recording specified. Hence, the record of a mortgage would be no notice to subsequent purchasers or mortgagees. It is well settled that the duty and benefits of recording private instruments, as well as any disadvantage from neglect to record them, are wholly statutory. Recording acts apply only to such instruments as the statute in terms requires to be recorded. Statutes which are only permissive in their language, and do not declare the record to be notice, are not mandatory, and have no other effect than is prescribed.

Boyd *vs.* Schlessinger, 59 N. Y. 301.
Cook *vs.* McChristian, 4 Cal., 23.
Farmers' & M. Bank *vs.* Manson, 14 Mich., 361.
Churchill *vs.* Little, 23 Ohio St., 301.
1 Story's Eq. § 404.

Baker *vs.* Washington, 5 Port. & St. 142.
Tatum *vs.* Young, 1 Port., 298.
Faulkner *vs.* Jones, 12 Ala., 165.
Moore *vs.* Hunter, 6 Ill., 317.
Parret *vs.* Shaubhat, 5 Minn., 323.

Neither fraud nor negligence can be predicated of an omission to do an act not required by law. Marshall, C. J., in Shirras *vs.* Caig, 7 Cranch, 50, said: "By the law of Georgia, a deed is valid if recorded within twelve months, but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or previously on the record. It appears to the court that neither negligence, nor fraud, which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the dispatch which the law requires. If subsequent purchasers, without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, and not to the individual who has complied with its requisition."

It is a fair deduction, from the reasoning in this opinion, that if the law had not required that deeds be recorded, there would be no neglect of duty, want of diligence, or fraud, in the omission to record; and conveyances would have effect according to the date of execution. The whole purpose of recording laws is to give notice; but the notice which the record of an instrument affords is not required when the holder is not required to record it; and then the voluntary recording of it will not impart notice; it would be an inefficacious act.

James *vs.* Morey, 2 Cow., 296.
Williams *vs.* Birbeck, Hoff. Ch. R., 359.

The Plaintiffs could derive no benefit from recording their mortgage, and were charged with no duty to inspect the record to obtain information whether a prior mortgage existed; nor were they warranted in acting upon the record as required to show what incumbrances had been executed.

The majority opinion of the Court below, while con-

ceding that the Statutes of Utah did not require that mortgages be recorded, holds, notwithstanding, that it was the equitable duty of the holders of such instrument to record them; it was, therefore, in effect, held that upon the option to record or not, necessarily to be implied from the silence of the statute, equity might engraft a command not expressed, and subversive of that option. If such a requirement can be declared in this case, it must be deduced solely from the statutes; from there being a recorder in each county charged with the duty to faithfully record mortgages, as one kind of the indeterminate "other instruments of writing and documents suitable, necessary and proper to be recorded." For no fact is found to raise that duty, if the statute did not require it. We insist that as the statute did not impose that duty, it can have no recognizable existance in law or in equity. The finding, therefore, that the Plaintiff's mortgage was in fact first recorded was immaterial, and the decree which denies to Defendant Neslin the right to have his mortgage first satisfied out of the proceeds of the property is erroneous.

Rankin *vs.* Scott, 12 Wheat, 178.

J. G. SUTHERLAND,
J. R. McBRIDE,
Attorneys for Appellant.

FILED
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JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States

No. 98.

SAMUEL NESLIN, impleaded with CHAS. F. SMITH, Appellant,

vs.

WELLS, FARGO & COMPANY, Appellees.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF FOR THE APPELLEES,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 98.

SAMUEL NESLIN, APPELLANT,

vs.

WELLS, FARGO AND COMPANY.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF FOR THE APPELLEES.

FACTS.

I.

April 22, 1874, appellees Wells, Fargo & Co., in the District Court of the third district of Utah, (R. 3,) brought suit on a note by Charles F. Smith for $13,000, *dated September* 27, 1873, due at sixty days to the order of J. W. Kerr; and to foreclose a mortgage securing the same *dated* 27*th of September*, 1873, (R. 8,) which was *filed for record at* 8 *a. m. on September* 29, 1873, (R. 10,) and was recorded 6*th October*, 1873; (R. 10;) and the complaint (R. 2) *alleges* the recording of said mortgage on 6*th October*, 1873, but also makes the mortgage *and its indorsement* an exhibit, which indorsement shows the filing for record to have been *at* 8 *a. m. September* 27*th*, 1873. (R. 10.) The complaint

makes said Smith and S. Neslin defendants; and avers the assignment to Wells, Fargo & Co., *before maturity and for value, of said note and mortgage.*

II.

Smith did not answer, and Neslin answered (R. 5–7) on the 5th May, 1874, (R. 7,) in substance:

(A) That before said $13,000 note was given (September 27, 1873) Kerr became security for Smith for large sums Smith owed to Wells, Fargo & Co., appellees, and that the $13,000 note and mortgage were given to secure Kerr as such security, and had no other consideration; and that no part of the debt of Smith to Wells, Fargo & Co. had yet been paid.

(B) Denies that Wells, Fargo & Co. paid value for said note and mortgage and avers that the transfer by Kerr to appellees was only as collateral to Kerr's liability, as surety for Smith, to appellees; and avers that appellees knew all said matters and facts when the assignment by Kerr was made.

(C) That at the date of said transfer Kerr and appellees knew of the existence of the note by Smith to Neslin set up in Neslin's cross-bill for $7,000, dated 27th November, 1872, (R. 10,) and of the mortgage securing the same upon the same property covered by the $13,000 mortgage, dated 27th of November, 1872, (R. 10,) which is made part of the answer, (R. 10,) and its indorsement shows it *filed for record 29th of September*, 1873, *at* 12.25 P. M., (R. 12,) and recorded 6th of October, 1873, (R. 12,) and that Kerr and appellees *knew*, when they assigned and received said $13,000 note and mortgage, that Neslin's note and mortgage were *unpaid*.

(D) That when the $13,000 note and mortgage were made, Smith and Kerr agreed that Neslin's $7,000 mortgage should be first recorded.

(E) Repeats that Wells, Fargo & Co., when they became assignees of the $13,000 note and mortgage, had notice of Neslin's mortgage.

(F) That Neslin's $7,000 mortgage is the prior lien.

A cross-bill is in the answer setting up the above matters.

III.

On the issue thus made the court, by agreement, on the 13th of July, 1875, referred the case to E. T. Sprague to take the testimony and report it to the court, (R. 12,) to be used in the hearing before the court. Said evidence was taken (R. 13 to 39) and duly reported to the court on the 31st of January, 1876. (R. 39.)

IV.

On the 1st of August, 1876, the court made and filed the finding of facts and conclusions of law, (R. 39,) and on the same day the court rendered its decree, finding that the $13,000 was the *first* lien, and that there was due on it to date of decree $19,349.50 and costs, (R. 41,) and ordered sale to satisfy same and judgment against Smith for what the mortgage did not pay; also finding due on Neslin's $7,000 note and mortgage $11,305 and costs, and giving judgment against Smith for what Neslin's mortgage did not pay, &c.

V.

The evidence taken before the referee Sprague was submitted to the court, and on the pleadings and proofs the case was argued by counsel; (R. 39;) but there is nothing

in the record showing that the court's attention was specifically directed to *any* of the objections to evidence, as these are noted in the report of the evidence as made by Sprague; nor does it appear *how* the court *ruled* on these separate exceptions, or that at the trial any exception to any ruling was taken, except that, on the 12th of September, 1876, (R. 43,) Neslin gave notice of a motion for a new trial on grounds stated in his notice; and the court overruled a motion, for the "*general*" reason that there was no error in the proceedings, finding, or decree. (R. 50.) The only bill of exceptions, or "statement," as it is called in Utah, and which was agreed to be "correct," (R. 43,) is the one on pages 43, 44, and 45 of the Record. This "statement" is one *not* purporting to be one recording exceptions made specifically during trial, and preserved, as is expressly required by section 188 of Code. (Sec. 1414, Compiled Laws.) It is *confined* in its scope, purpose, and effect to an assignment of grounds for a *new trial*, and appears in the record *only* as a part *of the notice* of a motion for such new trial.

VI.

The case was appealed to the Supreme Court of the Territory, and the decree of the court below was, on the 17th of August, 1878, affirmed. (R. 52 and 53.)

VII.

COURT'S FINDING OF FACTS.

The facts found by the court are on 39th and 40th pages of the Record, and their substance is as follows:

1. That the mortgage of $13,000 by Smith to Kerr, of 27th September, 1873, was *given* for a valuable consideration, and that said mortgage and the note were, before maturity, assigned by Kerr to appellees for a valuable

consideration, and that at the time Kerr and appellees *respectively* received such *notes* and mortgage, neither of them had "*any notice, actual or constructive,*" of any prior lien on the property covered by said mortgage.

2. That the *consideration* for the said note ($13,000) sued on was Kerr's *indorsement* of a note by Smith for $17,107.10, dated 5th July, 1873, to order of Kerr, due at sixty days, bearing one and one-half per cent. per month interest, and which note Kerr, on 5th of July, 1873, indorsed to appellees on the request of Smith, and on Smith's *promise* to Kerr to execute the note and mortgage sued on as part of one and the same agreement.

3. That said $17,107.10 note was for what Smith owed to appellees, and Kerr indorsed it as security and for the accommodation of Smith, and it was delivered to defendants in error on the day of its date.

4. That the $13,000 note sued on was by Kerr assigned, transferred, and delivered to appellees for a *valuable* consideration *before maturity*, to wit, as collateral security for said note of Smith of $17,107.10, so indorsed by Kerr, which was then due and payable, and that appellees thereupon, on said collateral, gave Kerr additional time, and agreed, temporarily, to refrain from pressing collection thereof. None of said $17,107.10 note has been paid, and is all due.

5. On and before the 5th of July, 1873, (the date of the $17,107.10 note,) Smith *was in possession* of the mortgaged premises, and so *continued* until *after the* $13,000 *note matured*, at which period Smith surrendered possession to appellees, who have ever since been in possession.

6. *None* of the $13,000 *note has been paid*, except what the appellees owe for rent of said premises during their said occupancy.

7. *That said mortgage was duly recorded in records of Salt Lake County at* 8 A. M. *of the* 29*th of September*, 1873.

8. That said Smith on the 27th of November, 1872, executed and delivered to the defendant Neslin a note for $7,000 and a mortgage securing the same, on the same premises covered by the $13,000 mortgage to Kerr, which $7,000 note was for part of the purchase-money of said premises, which were sold and deeded by Neslin to Smith by deed duly delivered.

9. *That said mortgage to Neslin was duly recorded in said records at* 12.25 P. M. *of the* 29*th of September*, 1873.

10. That none of the principal or interest of the said $7,000 note has been paid.

11. That $300 for attorney's fees are due Neslin, and are secured by his said mortgage.

LEGAL CONCLUSIONS

found by the court are, in substance:

1. That Wells, Fargo & Co. are entitled to a judgment against Smith on the $13,000 note for a balance after crediting $300 for rents; for $19,349.50, with interest at 1½ per cent. per month from date of decree; and that they have a *prior* lien on said premises for that amount.

2. That Neslin is entitled to a judgment against Smith for $7,000, with 1½ per cent. per month interest from the 1st of March, 1873, and $300 attorney's fees, and that he (Neslin) has a lien on said premises, subordinate to Wells, Fargo & Co.'s said lien; and a decree ordered accordingly.

To every part of which finding Neslin excepted, and thereupon decree was, on 1st of August, 1876, duly entered, as above stated.

ARGUMENT.

I.

THIS COURT HAS NO JURISDICTION IN THIS CASE,

Because the record contains no bill of exceptions or "statement," operating as a bill of exceptions under the statutes of Utah, showing objections taken "*at the trial*" in court to evidence, as required by the Utah statutes, and the ruling of the court thereon, and the exceptions reserved on such trial; but, on the contrary, only sets forth a "statement" made the grounds for motion for new trial; (R. 43, 44;) and as the record presents no *other* grounds for reversal than such as were a part of, and as were presented and acted upon as and for, a motion for a new trial, therefore this court has no jurisdiction to review said alleged action of the court below.

The present case is ruled by the case of Kerr *v.* Clampitt, 5 Otto, 188.

In that case, precisely as in the present one, the bill of exceptions, or "statement," was embodied in the motion or notice of motion for new trial.

In *that* case, unlike *this*, said "statement" showed each objection, ruling of the court, and exception preserved, and showed these *specifically*, *exactly*, and *separately*, as the same occurred "at the trial."

In that case there was a motion for a new trial (Clampitt, R. 10) specifically setting out the errors of the trial, and referring to said bill of exceptions, made part of said motion. In this case the record shows a *notice* of a motion for a new trial, and that *a* motion for a new trial was overruled, (R. 5,) but it does not show the motion itself.

In the Clampitt case the bill of exceptions contained the same *kind* of exceptions (in part) as are presented in the "statement" in this case, such as admitting improper evi-

dence; and *also* objections to instructions to the jury. (Clampitt, R. 10 to 16, inclusive.)

In that case, as in this, counsel for the respective parties agreed that the "statement" for a motion for a new trial was "correct."

That case was a jury case, and came up on error, and was, therefore, unlike this equity case, coming here by appeal, but coming subject to the provisions of the act of April 7, 1874, (18 Stat., 27, 28,) requiring a statement of facts in the nature of a special verdict, and was, furthermore, a case where, by the laws of Utah, the court was required to find the facts and conclusions of law specially and separately.

In this case of Clampitt and Kerr the court (p. 189) says:

"Whether the application for a new trial be made upon affidavits or a 'statement' thus prepared," ("setting forth so much of the proceedings had, evidence given or offered, and rulings of the court as will distinctly present the grounds urged in its support,") "the rulings thereon, whether of the District Court originally or of the Supreme Court of the Territory on appeal, are *not* subject to review by this tribunal. We have *no jurisdiction* to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision. The final judgment cannot be examined through the rulings of the lower court upon *that* question. If, therefore, when the final judgment is brought before us for review by writ of error, *no other documents are presented for our consideration than such as were before the inferior court upon the application for a new trial, we cannot look into them;* and if the error is not *otherwise* disclosed by the record, the judgment must be affirmed. And such is the condition of the case at bar. No question was before the District Court or the Supreme Court of the Territory except such as arose on the application for a new trial."

The court then examines the statutes of Utah relating to "bills of exceptions," and says it is "*not uncommon for coun-*

sel to stipulate that the statement on the motion" for a new trial "shall be treated as a statement or bill of exceptions on appeal from the judgment. But unless it is so stipulated the statement, intended for the motion, CANNOT BE USED ON APPEAL FROM THE JUDGMENT, OR CONSIDERED HERE."

In the case at bar the entire record shows that the only bill of exceptions, or "statement," was and is one framed for, used on, and made part of the motion, or notice of motion, for a new trial; and for nothing else. *There is no stipulation that it might be used on appeal.* It was before the court only on the motion for a new trial. It was not in existence until the 12th of September, 1876, (R. 43,) which was eleven days after decree, when it *first* appears as embodied in a notice of a motion for a new trial. No "*other* document" is here, presenting exceptions or errors occurring on that trial, than such as are attempted to be preserved in said notice of motion for new trial.

Hence, unless this case can he distinguished from Kerr *v.* Clampitt by the fact that this is in equity and that was at law, then Kerr and Clampitt is certainly conclusive of the present case.

This court cites (5 Otto, 190) Sparrow *v.* Strong, 4 Wall., 584; Cassgrove *v.* Howland, 24 Cal., 475; Carpenter *v.* Williamson, 25 Id., 154.

II.

In this Class of Appeal Cases this Court cannot retry Facts.

The fact that this is an equity case, and here on appeal, does not take it out of the law governing Kerr and Clampitt.

Stringfellow *v.* Cain, 9 Otto, 610, brought into this court by appeal from the Supreme Court of Utah a case which was of the class which the act of 7th April, 1874, (18 Stat., 27,)

requires to be prosecuted by appeal, and not by writ of error. The court there held that because that case was one not tried by a jury, it was a proper case for appeal under said act, and the court ordered the appeal to stand, and a writ of error to be dismissed. (P. 612.)

So that our case is one of the class prosecuted in this court by appeal; and the point now is, whether the rules of practice established regarding exceptions, motions for new trials, bills of exceptions, and the like, by the laws of Utah, and which were enforced in Kerr *v.* Clampitt, apply also to trials by the court in cases like the present.

This court held that they did apply in the *appealed* case of Stringfellow *v.* Cain; and proceeded to find that, because "the statement on appeal" contained all the testimony, written proofs, and statement of the parties, and was duly certified up; and because IT WAS STIPULATED that "the statement on appeal from this order" [refusing a new trial] "*might be used, so far as applicable, on the appeal from the judgment,*" therefore the Supreme Court of the Territory was required to inquire into the merits of the case.

This court then further proceeds to inquire whether, under that clause of the act of 9th April, 1874, which provides that in all cases brought into this court by appeal "a statement of the facts of the case, in the nature of a special verdict, and also the rulings of the court," &c., shall be certified and transmitted to this court, there was such a finding of facts, in that case, by the Supreme Court of the Territory, as gave this court jurisdiction, and the court found that there was such a finding.

This case is here cited only for the purpose of establishing the proposition that the same rules apply to an *appealed* case, involving the trial of disputed facts, under the act of 1874, regarding the necessity of a "statement" or bill of exceptions, and regarding the necessity for a bill of exceptions taken and presented, or else one expressly *agreed to be used for the appeal from the judgment*, as distinguished from

one made for and used on motion for new trial, as were applied to a jury case, as expounded in the case of Kerr *v.* Clampitt.

In so far as the assignment of errors here (see brief of plaintiff, pp. 3 and 4, assignments 1, 2, 3) objects to ruling on the admission of evidence, they are not here available, because not preserved by any bill of exceptions, either *taken* for or *agreed* to be used in an appeal from the *judgment*, as distinguished from an appeal from the order refusing motion for a new trial. In so far as the other assignment of error objects that the evidence does not sustain the finding of facts, *that* question as to what the evidence *does* establish cannot be reviewed here for the reason last named, that there is no proper bill of exceptions, and for the *additional* reason that, in cases where there is either a special verdict finding the facts, or where the court specially finds the facts by agreement of the parties, or where, *as here, the statute requires a special finding of the facts in the nature of a special verdict*—in all such cases this court will not retry the question what the evidence proves. (9 Wall., 38, 40 ; 2 Otto, 467, 471; 21 Wall., 158, and cases cited on pages 160, 161; 19 Wall., 70; 18 Wall., 148, 149, and cases cited.)

The result of what has now been said is this:

1. That since this record presents no bill of exceptions or " statement on appeal," save one which is made and used as a part and basis of a motion for a new trial, and since there is no *agreement* that said statement should be used or made available on appeal from the *judgment*, therefore said statement was, *at best*, only available to the appellant on a review of the order refusing a new trial, and this court has no jurisdiction to review any question presented by this record.

2. That under the act of 7th of April, 1874, (18 Stats., 27, 28,) it is incompetent for the parties, even by means of

a proper bill of exceptions or "statement on appeal," to bring into this court all the evidence used on the trial below by means of an appeal of non-jury case, and thus compel this court to retry the facts upon all the evidence, or to determine whether the evidence below justified the court in finding the facts found below. This is not allowed (as may be done in ordinary appealed equity cases) under this statute, because of the requirement of the statute that "a statement of the facts *in the nature of a special verdict*" must be made below and certified here.

BILL OF EXCEPTIONS BAD FOR UNCERTAINTY AND OTHERWISE.

This record, as we have seen, *confines* the "statement" or bill of exceptions (Record, 44, 45, 46) in express words as follows: "Statement on motion for a new trial;" (Record, top of 49;) also in these words, "said *motion* will be made on a '*statement*' to be settled and filed *hereafter*;" (R. 43;) also in these words, "the foregoing 'statement of the case' and assignment of errors, upon which he will rely on his *motion* to set aside the findings of facts and the judgment or decree herein, and for a *new trial*." (R. 46.) The agreement at the bottom of page 43 contains no hint that the statement might be used *on appeal from the judgment*.

By the authority of the above cases it cannot be used in this appeal.

But suppose we are mistaken in this, and that it *can* be used, if it were otherwise good, on the *appeal from the judgment*, then we submit that it is not good, by reason of its generality, indefiniteness, and failure to show objections made, rulings by the court had, and exceptions thereto preserved, "at the trial."

How the court ruled regarding any one of the objections noted in the report of Sprague (R. 14 to 35) is nowhere

directly indicated. Whether they were in whole or part insisted on, or waived at the trial, is not directly indicated. What evidence the court used in finding any one of the facts is not directly indicated. All that we have is an assignment of errors, drawn in the words of the counsel for plaintiff below, attributing error to the court in ruling particular things. The action of the court on objections—whether objections were *in fact* made—whether an exception was in fact taken at the time of the ruling, are all totally omitted, and these are left to be *presumed* from the plaintiff having said, in a motion for new trial, the court erred in doing particular acts. Suppose this court will from this *presume* the court did the attributed act, will this court, in order to *make* error, *also presume*, what even *this* statement does not hint at being true, that when the court so acted erroneously the party *thereupon excepted* and noted an exception?

In support of our proposition that this bill of exceptions is not good owing to its failure to show that any one of the exceptions was taken at the trial, and are indefinite and vague in failing to show what the objections *actually presented* on trial were; what was *asked as to each* at the trial; what the court ruled, and *what exception was at the time* taken, it is enough here to rely on cases like

Insurance Co. *v.* Sea, 21 Wall., 158.

Young *v.* Martin, 8 Wall., 354.

IV.

The Kerr Mortgage was the Prior Lien.

If this court can go to the merits of the case decided below, then we submit the case was rightly decided.

And, first, was the lien created by the $13,000 mortgage to Kerr, dated the 27th of September, 1873, filed for record at 8 A. M. of the 29th of September, 1873, (R. 40, 7th find-

ing,) in law and equity a lien prior to that created by the $7,000 mortgage to Neslin, dated the 27th of November, 1872, but not filed for record until 12.25 P. M. of the 29th of September, 1873, (R. 40, 9th finding,) the fact being also that neither appellees nor Kerr had, either when Kerr agreed for the $13,000 mortgage, (5th of July, 1873, 2d finding, R. 39,) or when it was actually executed and recorded, nor when the $17,107.10 was given to appellees by Kerr and Smith, any notice of any prior liens on said property?

1. In so far as the answer to this question may depend upon the further question whether, under the facts here found, Kerr, in receiving this $13,000 note and mortgage as security against his liability for Smith on the $17,107.10 note, or appellees in taking it as collateral security for the payment of the antecedent debt of Smith and Kerr, as evidenced by the said $17,107.10 note, are to be deemed, in the fullest sense, *bona-fide purchasers* of the $13,000 note and mortgage, we are relieved of all discussion by the most elaborate discussion, and the decision of that question, in Railroad Company *v.* Bank, 12 Otto, 14, where it is held that such purchasers are *bona-fide* purchasers for value.

In Singer Manufacturing Co. *v.* Chalmers, 2 Utah, 542, the same thing is decided.

In Beals *v.* Neddo, 1 McCrary, 209, (C. C. R.,) are found the authorities from this court (16 Wall., 275; 19 Wall., 147) establishing the proposition that one who buys before maturity a negotiable note secured by mortgage is also a *bona-fide* purchaser of the mortgage. (See also Fry *v.* Clifford, 44 Cal., 335.)

2. If it should be contended that when Smith, on the 27th of September, 1873, gave to Kerr the $17,107.10 mortgage, Smith then being in full possession and holding

a full and absolute deed duly recorded, he (Smith) could not grant by his said mortgage a lien superior to Neslin's lien for his $7,000 of purchase-money, either because of the existence of said vendor's lien or otherwise, then the answer to that is that this court holds the law the other way.

In Bayley *v.* Greenleaf, 7 Wheat., 46–57, this court, after fully considering this point and deciding that the weight of authority was that a purchaser or mortgagee, without notice of a vendor's lien, would be protected, concludes its opinion in these words:

"In the United States the claims of creditors stand on high ground. There is not, perhaps, a State in the Union the laws of which do not make all conveyances not recorded and all secret trusts void as to creditors as well as subsequent purchasers without notice. *To support the secret lien of the vendor against a creditor who is a mortgagee would be to counteract the spirit of these laws.*"

To this language of Chief Justice Marshall, as not only a decision of the present point, but as expository of the spirit of our registry laws, we beg the attention of the court.

3. That the facts found in the second finding (R. 39) make Kerr's indorsement for Smith of the $17,107.10 note the "*same transaction*" with and the *consideration* for the $13,000 note and mortgage dated 27th of September, 1873, in such sense that equity will so regard and treat them, cannot be doubted.

It is simply an axiom that equity looks upon that as done which ought to have been done. Therefore our $13,000 note and mortgage will be held to have been made on that 5th of July, when it was *promised* to be at once made contemporaneously with Kerr's indorsement. "All agreements are considered as performed which are made for a valuable consideration, in favor of persons entitled to

insist upon their performance. They are to be considered as *done at the time*, when according to their tenor they ought to be performed." (1 Story Eq., sect. 64 g, and see cases in 3 Washb. on Real Prop., pages 276–277.) Hence all claim that when Smith gave the $13,000 mortgage to Kerr, the latter had *already* (5th July, '73) become liable for Smith, and hence Kerr parted with nothing when he took the $13,000 mortgage, is answered by the principle just stated, which makes Kerr's said indorsement and his receipt of said mortgage "*one transaction*."

Besides this, when Kerr *actually took* the $13,000 note and mortgage, Smith was still in possession, Nelson's mortgage was still unrecorded, and neither Kerr nor appellees had any sort of notice of any vendor's or other lien.

4. Next. Do the laws of Utah apply to mortages the equities and priorities usual under the registry laws of these States, and give to the mortgagee, having no *actual* notice of prior liens, priority over all liens unrecorded at the date of filing, for record, his lien?

The opposing brief admits (p. 99), and the fact is so, that an act of 2d March, 1850, (Rev. Stats. of Utah, p. 130,) enacted in these words: "All *transfers or conveyances* of lands or tenements, and all other instruments of writing and documents suitable, necessary, and proper, to be recorded in a fair and legible manner."

Another act of January 19, 1855, (Compiled Stats., 130,) enacted that the recorders were required to "keep books, in which they shall record deeds and all *other instruments of writing necessary and proper to be recorded*," *&c.*

The practice act of February 17, 1870, sections 272 and 273, (Compiled Laws of 1876, p. 481,) provides, in partition cases, for the recorder of the county certifying to the court what *liens* of record were on the property at the date of commencement of the partition. Other statutes (as, for

example, section 267 of Code,) recognize and affirm as the true interpretation of these laws providing for the record of "all transfers and conveyances," and of "all other instruments of writing and documents suitable" as laws requiring the registration of mortgages.

Such being the registration laws of Utah, and such the statutes and interpretation thereof, is a mortgage first filed for record by a *bona-fide* mortgagee entitled to priority?

If a mortgage is either a "transfer" or "deed," or a "conveyance," or an "instrument" "suitable, or necessary, or proper to be recorded," then it is one of the instruments under these acts of 1850 and 1855, at least *authorized* to be recorded.

This court holds that a mortgage is a "conveyance" which passes the legal title and leaves but an equity of redemption in the mortgagor, (Brobst *v.* Brobst, 10 Wall., 519,) the court in that case saying (pp. 529, 530): "But as between the parties to the instrument or their privies it is a *grant* which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem."

This certainly makes mortgages "conveyances." This exact point is thus disposed of by Mr. Hilliard. (1 Hilld. on Mortg., section 1, ch. 24, p. 715.) He says: "In all the States express provision is made for recording *deeds; applying, in the absence of express provisions to the contrary, as well to mortgages as to absolute conveyances.*"

5. Here then is a statute directing, or at least *authorizing*, mortgages to be recorded, and in the absence of express provision in the statute declaring the legal effect of registration, or the want of it, upon the public, what effect will the law attribute to the registry statute?

We reply that such a statute is, in the first place, a *mandatory* one, and requires parties dealing with such titles to

place them on record under risk of loss of title in case of reasonably avoidable delay.

This statute's language is at least as mandatory as if the words used were "mortgages *may* be recorded." The courts uniformly hold that where the statutes use permissive language regarding matters "*where the public interest or individual rights call for its exercise, the language used, though permissive in its form, is in fact peremptory.*" Words of this court in Supervisors *v.* U. S., 4 Wall., 446, and see cases there commented upon and cited; also 5 Wall., 705.

Here are acts passed in 1850 and 1855 providing for registration of mortgages. When so passed it was true that in every State in the Union registry laws had been passed. (1 Hill., 715.) It is also true that these registrations had then universally taken the place of the common law livery of seizin. It was then also true that such laws were held to be mandatory, and to give priority of right according to priority of filing for record by *bona-fide* purchasers without notice of unrecorded liens.

Such being, in 1855, the universal operation, office, and effect of these laws, one is passed in Utah providing for registration of mortgages. It is impossible to conceive of a law more deeply affecting the property interests of the public than are registry laws, giving public notice of the state of the title to all the lands of the people. There is none, therefore, to which the words of this court more fully apply, which say that language, though permissive in form, will be held mandatory where the public interest requires this.

A statute of this character, so passed in pursuance of a universally known and practiced policy whereby registration is made *notice* of title and want of it notice of absence of title, is, in this case, asked to be interpreted as an anomaly—as one providing for notice or no notice to the public, as to the state of titles, where it suited the convenience or whim of those dealing with the title to give the

notice or not to give it, and where it did not suit such whim to compel the entire public to deal with the title at their own peril; and to have all outstanding, but secret, conveyances liable to be sprung, by the negligent or fraudulent holders, upon the innocent and *bona-fide* purchasers so dealing.

To give such an interpretation to such a statute, passed at such a time, and for such purposes, would, as seems to us, be little short of absurd. But precisely this is what the opposing brief (p. 10) of our learned opponent asks.

Such a construction takes from the registry acts the entire object and policy on which they are founded.

Says Hilliard (vol. 1, p. 716): "An act providing for registration is a *mere statute of notice*, and is not evidence of *execution*." (Munroe *v.* Merchant, 26 Barb., 383.) Of course express provisions, in registry acts, declaring the effect of registration, or the want of it, on the matter of priority, will control. But where, as here, the statute stops by simply requiring registration, then, in construing the statute regarding its effect on the matter of priorities and of notice, it will be construed as a statute securing *notice* and protection of *bona-fide* purchasers without notice. Mr. Wade in his work on Notice (sec. 96) says: "The general spirit and object of the different American registration acts are substantially the same. They are intended to furnish the best and most easily accessible evidence of the titles to real estate, to the end that those desiring to purchase may be *fully* informed of instruments of prior date affecting the subject of their contemplated purchase" * * * "may purchase with absolute security," provided without actual notice, &c. Shaw, C. J., says the same thing—that "the *sole*, or at least main, object of registry laws is to give notice." (6 Cush., 167.)

6. Such being the entire policy and purpose of all registration laws as *statutes of notice*, it is impossible to attain the

only object for which they are made, except by making a negligent omission by Neslin to record a mortgage for over a year, and until after another (Kerr) has advanced a large sum (here $17,000) on the faith of the fact that Smith had been in *notorious possession* for over a year, had received from Neslin an absolute and full deed, and had put on record no mortgage, work a postponement of the negligent mortgagee (Neslin) to the *bona-fide* one who first records. And so are the authorities.

Wade on Notice, section 256, has these words:

"Under statutes *which prescribe no time within which the instrument may be recorded*, the courts have generally regarded the first recorded of two instruments affecting the title to the same land as the one entitled to precedence."

All decisions, in States having registration laws giving to grantees a prescribed period within which they may record deeds and mortgages, and making them take effect from the date of the instrument, which hold such instruments may be recorded *after* the expiration of the *time so given* by the statute, and make such record notice *from the time of record*, are decisions holding the very doctrine we here assert. (See the cases cited in 3 Wash. Real Prop., 287, s. p. 593.)

By all the authorities in this country and England the test as to what is requisite to make the fact of registration have the effect of giving notice to subsequent purchasers, and the want of registration to give authority to deal with the title as disclosed by the reord, is this:

Is the instrument one belonging to a class which the registry law requires to be recorded?

Is the instrument executed according to the forms, &c., prescribed in order to entitle it to record, and to make it notice, when examined, of what is conveyed?

If it have these requisites, and the registry statute be silent as to the effect of priority of registration, the univer-

sal interpretation of registry laws is that the first recorded by purchasers without notice of unrecorded grants shall be prior in right.

7. We most respectfully submit that any other construction of registry laws, requiring mortgages and other grants to be recorded, but silent as to the effect of prior registration, or the want of it, than one which makes registration *notice* of title and the want of registration notice of the absence of title, and which makes it *safe* for the public, having no *actual* notice, to deal with titles as they are disclosed by the public records required by law, is a construction which makes such laws not merely useless and senseless, so far as *notice* to the public is furnished thereby, but makes them "a delusion and snare."

8. A large number of cases are cited in the opposing brief, (pp. 10–11,) which seem to be cited in support of the proposition that where registration laws fail to expressly declare what the effect of registration shall be, there they have no effect as notice—that no effect as notice shall be given to a registration (or the want of it) as notice, which the statute does not give, though the registration itself is directed by, and made in accordance with, law.

These cases we have examined, and on inspection we think the court will find no one of them asserts any such law. What they do hold is that the record of an instrument which the law does not, either because of its defective execution or because it is not of a kind authorized to be recorded, provide for being recorded, imparts no constructive notice to any one.

This is familiar law and not here disputed.

9. Should it be claimed that when appellees actually received from Kerr the $13,000 note and mortgage, the $7,000 mortgage to Neslin had been recorded, and hence

was then constructively known to appellees, and hence that appellees are postponed to Neslin's mortgage, then the answer is obvious. The title held by appellees is that of Kerr. They, in contemplation of law and equity, hold in trust for Kerr, and hold all which Kerr could and did hold, as against Neslin. Kerr, being a *bona-fide* purchaser for value prior in right to the $7,000 mortgage, could assign all that he owned to any one, though the assignee then knew of the $7,000 mortgage.

Say Clark and Wallace, 2 Lead. Cases in Eq., 184:

"And it is equally well settled that a purchase *with notice* will be good if made from one who is shown to have been a purchaser without notice."

Turrell *v.* Bigelow, 16 Mass., 406.
Boynton *v.* Rees, 8 Pick., 329.
Mott *v.* Clark, 9 Barr, 399.
Lacy *v.* Wilson, 4 Mumford, 313.
New Orleans *v.* Montgomery, 5 Otto, 18.
Lawrence *v.* Stratton, 6 Cush., 163.

This is laid down with regard to rights under the registration laws.

V.

Indorsémenms by Recorder of Hour of Filing, Official.

The first assignment of error objects that the official indorsement, by the recorder, of the date of filing the $13,000 mortgage was improperly used as evidence, in violation of the averments of the complaint and admissions of the answer.

In so far as this assignment is an objection to the indorsement on the mortgage as being in the nature of hearsay, the objection, we think, is manifestly not well taken.

What we have said above shows this mortgage one required to be recorded. As an incident of this requirement the recorder is compelled, as an incident of his official duties, to note the fact and time of filing for record. This note is an *official* act and record, and, as such, is proved by its production. This is decided by this court in Anthony *v.* Butler, 13 Pet., 423, 435. The court says: "We think also that the Circuit Court did not err in deciding that the certificate of the clerk was sufficient evidence that the mortgage deed was duly recorded."

In so far as this assignment objects that the proof contradicted the pleadings, the objection, we think, is equally unsound. This indorsement of hour of filing, *as an official act*, becomes *part of the instrument*, and makes its *beginning* or *date* as a public record, and as notice to the public. When it is pleaded, as in this case it is, as part of the exhibit "A," *it is well pleaded.* Mr. Greenleaf (vol. 1, sec. 484) expressly names "matters of *priority* where the public are concerned" as among the things which are official acts made part of public records, and proved by the production of the record.

In regard to *when* such instruments become records, Mr. Washburne says (3 Wash., 285) that the date of *record* is the date of *filing* for record in probably every State in the Union.

Hence this indorsement is one fixing the date of the record, is one which is proved by the production of the record, is one fixing *priority* of lien, and is well pleaded as such. The fact that the petition avers a record on the 6th as the time when it was actually spread on the books, does not contradict or destroy the legal effect of the other averment of the pleading, viz., the filing at 8 A. M. on the 29th. The averment of actual recording on the 6th is, *at the worst*, only surplusage.

The second and third assignments of error (Brief, pp. 3, 4) present questions of error in admitting testimony. Be-

sides the fact, above noticed, that these cannot be here considered because not brought here by a proper bill of exceptions, there was manifestly no error in the rulings. In so far as the fourth assignment of error is meant to affirm that suit could not be maintained on the $13,000 mortgage because Kerr had not paid the debt secured collaterally by that mortgage, we reply that, if this court could consider the question, there is, we submit, no error in this regard. A creditor or payee holding collaterals, either as an assignee of a security or directly from the principal debtor, can sue on the *collaterals* when the principal debt is due and unpaid.

More than this: Kerr could compel—even before he had paid anything upon the $17,107.10 note—Wells, Fargo & Co. to resort to the land covered by the $13,000 mortgage.

McLean *v.* Lafayette, &c., 3 McL., 587.
State, &c., *v.* Campbell, 2 Rich. Eq., 179.
1 Washburne on Real Property, 344.

We have now gone over the points, arising on the assignments of error, in the way of abundant caution; but we submit that none of these questions are before this court, and that the case must be dismissed, for the reasons assigned in the early parts of the brief.

SHELLABARGER & WILSON,
Of Counsel for Appellees.

Kerr v Campbell

5 Utah 185

No bill of exceptions

Must rely upon the findings

The question then is did

the court err in

to the issue of the mortgage

held by complainants?

Sec. 216-219 of Laws of Utah

14-441

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 147.

SUSAN VIGEL, APPELLANT,

vs.

SUSAN HOPP.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 27, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 147.

SUSAN VIGEL, APPELLANT,

vs.

SUSAN HOPP.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Bill in equity.*

In the supreme court of the District of Columbia, February 23, 1875.

SUSAN HOPP, PL'T'FF, *vs.* SUSAN VIGEL, JOHN H. HOLDEN, RICHARD H. Marsh, def'ts.	Equity. No. 4216.

To the supreme court of the District of Columbia, holding an equity court for said District.

1. The plaintiff states as follows: The plaintiff is a resident of the city of Washington, in the District of Columbia, and brings this suit in her own right; and the defendants are also residents of said District and are sued in this suit.

2 2. That Richard Vigel, the father of the plaintiff, departed this life in the year of our Lord 1869, leaving the plaintiff his sole heir at law, whose maiden name was Susan Vigel, intermarried with Henry Hopp who departed this life in the year of our Lord 1873. That the said Richard Vigel, the father of the plaintiff, died *siezed* and possessed of a certain parcel or lot of land, lying and being in the said city of Washington, the same being designated as lot number four (4), upon the plat of the subdivision made by Samuel D. King of original lots number ten (10), eleven (11) and twelve (12), in square number one hundred and ninety-eight (198), as the same is recorded in liber N K of said subdivision, at page 268, in the surveyor's office of said city of Washington, dated the 8th of July, 1844, and which said lot, according to said plat, has a front of 21 feet on L street north, with a depth of 106 feet, improved by a two-story frame house, and worth altogether between three and four thousand dollars. Besides this real estate the father of the plaintiff owned, and which descended to her as sole

3 heir, he had an undivided fourth interest in a piece of real property Alexandria County, in the State of Virginia, upon which there was an indebtedness, and the several parties interested being desirous to clear the property and enable them and the plaintiff to make a sale of it to advantage, the said parties informed the plaintiff that it would require on her part between $300 and $400. The plaintiff spoke to the defendant Susan Vigel in reference to securing this loan, and she told her that the defendant Richard H. Marsh could get her the money. The plaintiff applied to said Marsh, and by a mutual understanding the plaintiff and defendant and the said Henry Hopp, now deceased, met at the said Marsh's office, where the transaction was to be completed. The arrangement was made that the plaintiff and her husband was to give a deed of trust on the aforesaid house and lot in Washinton and give their note for $400, and they were informed they would get the

4 money at the bank. Both the plaintiff and her husband were illiterate and could neither read nor write, and were guided entirely in the execution of papers by the defendants Susan Vigel and Richard H. Marsh. She procured the $400, paid off her share of the indebtedness on the Virginia property before named, and it was afterwards sold, and the plaintiff's share in the proceeds was about $700, with a portion of which she paid off the said $400 and interest. The plaintiff went with the said defendant Susan Vigel to the bank and paid the money and wished the note when she had paid it to be given to her, but the said Susan Vigel said she would take it as she could take better care of

it. This she did not object to, as she at that time had no suspicion of dishonesty in her aunt. Sometime after she had paid the said note she supposed that something was necessary to be done by her aunt (who, she yet had the impression, had loaned her the money), and she applied to her for what she was told was called a release of the deed
5 of trust; in answer to her application the said Vigel told her she had no interest in the property; that she had bought it from her and paid her a thousand dollars for it. The plaintiff was shocked to hear such a pretension set up, and afterwards made a request for the same thing, but was always answered by her aunt that she owned the property. Concluding there must be something in the transaction more than she understood, she applied to an attorney to examine into the matter, and as he reported the record the plaintiff had been defrauded out of her property, besides having paid the $400 which she had supposed she had borrowed. It appears that the said Marsh drew a deed in fee-simple from the plaintiff and her husband, Henry Hopp, to the said Susan Vigel for the consideration named of $1,000. This deed bears date the 12th of August, 1870, was acknowledged before the said Marsh, and recorded in liber 621, fol. 384, one of the land records for the District of Columbia. A copy of this deed is filed herewith, marked Exhibit
6 No. 1, S. H., as part of this bill. It was also ascertained by said examination, that instead of the plaintiff and her husband having executed a deed of trust on said property for the $400, the defendant Susan Vigel had executed such deed to secure that amount to Henry Hopp. In this deed of trust there is no trustee named, but one John H. Holden executed a release on the 22nd day of March, 1872. This deed of trust bears date on the 12th day of August, 1870, that is, even date with the pretended deed in fee. The acknowledgment of these two instruments was also taken by the said Marsh; the deed of trust by him as a justice of the peace, and the release, a notary public. These deeds are also recorded amongst the land records aforesaid, and copies of the same, marked respectively 2 & 3, S. H., are herewith filed to be considered as part of this bill.

3. The plaintiff charges that she had no idea of selling the said house and lot, and that the matter of a sale had never been mentioned
7 by her or to her; that her object as stated was to execute a deed of trust to some person on the property to get the loan of $400.00; that she paid the $400.00 with interest out of her own money as hereinbefore stated; that the deed in fee of the 12th day of August, 1870, was fraudulent and void, and ought to be annulled, and that the deed of trust of the same date was also fraudulent; that it was not intended that the last mentioned instrument was to be executed by the said Susan Vigel, but was to be executed by the plaintiff and her husband, Henry Hopp; that the great inadequacy of the consideration for the said property, to wit, $1,000.00, while the said property is worth at least $3,000.00, would have prevented her from making any such sale; that the said deed of release from Chas. H. Holden, who was not named in the said deed of trust, is also fraudulent and void; that the honorable court will perceive that the said deed in fee is signed by the mark of the plaintiff and her husband, the said Henry Hopp. And the plaintiff in
8 addition to what she has before stated, that she did not and never intended to make a sale of said house and lot, says that she never received a dollar of the money alleged as consideration in said deed for said property.

PRAYER.

1. That the said Susan Vigel, John H. Holden, and Richard H. Marsh

be made parties defendant to this suit and be required by subpœna to be served upon them to appear and answer this bill of complaint, at a time to be named therein, upon their respective corporal oath; and that the said Susan Vigel may be enjoined and restrained in the mean time from making sale of or in any wise encumbering the said real estate described in the bill; and

2. That the said deed in fee of the 12th day of August, A. D. 1870, and the deed of trust of the same date, and the deed of release of the 22d day of March, 1872, from the said Holden, may each be decreed to be null and void, and that the plaintiff may have general relief.

9 May it please your honors to grant the United States writ of subpœna and injunction, and such other process as may be needful.

her
SUSAN + HOPP.
mark

JOHN E. NORRIS, *Sol'r for Pl'ff.*

I do solemnly swear that I have heard read the bill by me subscribed and know the contents thereof, and that the facts therein stated as of my own knowledge are true, and that the facts therein stated on the information of others I believe to be true.

her
SUSAN + HOPP.
mark

Subscribed and sworn to before me on the 5th day of March, A. D. 1875.

R. J. MEIGS, *Clerk,*
By L. C. WILLIAMS,
Ass't Cl'k.

10 *Exhibit No. 1, S. H.—Copy deed.*

Henry Hopp et ux. to Susan Vigel. Deed recorded August 17, 1870, 2 p. m. Liber 621, folio 384. Stamp $1.00.

This indenture made this twelfth day of August, in the year of our Lord one thousand eight hundred and seventy, between Henry Hopp and Susan Hopp, his wife, of the city of Washington, District of Columbia, heirs at law of Richard Vigel, deceased, late of said city and District of Columbia, of the first part, and Susan Vigel, of the same place, of the second part,

Witnesseth that the said parties of the first part for and in consideration of the sum of one thousand dollars in lawful money of the United States, to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, her heirs and assigns forever, all that certain piece or parcel of land

11 situate, lying, and being in the city of Washington, and being designated as lot (No. 4) number four, upon the plat of the subdivision made by Samuel D. King, of original lot number ten, eleven, and twelve in square number one hundred and ninety-eight (198), as the same is recorded in liber N. K. of said subdivision at page 268 in the surveyor's office of said city, on the 8th day of July, 1844, and which said lot according to said plat has a front of twenty-one feet on L street north with a depth of one hundred and six feet;

Together with all the improvements, ways, easements, rights, privileges, and appurtenances unto the said party of the second part, her heirs and assigns, to their sole use, benefit, and behoof forever.

And the said Henry Hopp and Susan Hopp, for them and their heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said party of the second part, her heirs and assigns, that they the said parties of the first part and their heirs shall and will warrant and forever defend the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, her heirs and assigns, from and against the claims of all persons claiming
12 or to claim the same or any part thereof by, from, under, or through themsel's or any or either of them.

And further, that they, the said parties of the first part and their heirs, shall and will at any and at all times hereafter, upon the request and at the cost of the said party of the second part, her heirs or assigns, make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, her heirs or assigns, as the said party of the second part, her heirs or assigns or their counsel learned in the law shall advise, devise, or require.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

HENRY his + mark. HOPP. [SEAL.]

SUSAN her + mark. HOPP. [SEAL.]

Signed, sealed, and delivered in the presence of—
R. H. MARSH.

DISTRICT OF COLUMBIA,
County of Washington, ss:

13 I, R. H. Marsh, a justice of the peace in and for the county aforesaid in the said District, do hereby certify that Henry Hopp and Susan Hopp, his wife, parties to a certain deed bearing date on the twelfth day of August, A. D. 1870, and hereto annexed, personally appeared before us in the county aforesaid the said Henry Hopp and Susan Hopp, being personally well known to us to be the persons who executed the said deed, and acknowledged the same to be their act and deed.

And the said Susan Hopp, wife of Henry Hopp, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed sealed and delivered the same and that she wished not to retract it.

Given under my hand and seal this twelfth day of August, A. D. 1870.

R. H. MARSH, *J. P.* [SEAL]

This is to certify that the within is a true and verified copy of a deed as recorded in liber 621, fol. 384 et seq., one of the land records for the Dist. of Columbia.

Washington, D. C., Jan'y 23rd, 1875.

S. WOLF, *Recorder*,
GEO. F. SCHAYER, *Dep.*

14 *Exhibit No. 2, S. H.—Copy deed.*

Susan Vigel to John H. Holden. Trust recorded August 17, 1870, 2 p. m. Liber 621, folio 385. Stamp 50c.

This indenture, made this twelfth day of August, in the year of our Lord one thousand eight hundred and seventy, between Susan Vigel, of the city of Washington, District of Columbia, of the first part, and , as a trustee of the same place of the second part.

Whereas Susan Vigel is justly indebted unto Henry Hopp of said city in the sum of four hundred dollars, for which has executed her promissory note of even date herewith, payable twelve months from date, with ten per cent. interest thereon semi-annually, and being desirous of securing the prompt payment thereof when due, doth hereby make and ordain the following trust:

Now, therefore, this indenture witnesseth, that the said party of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar in lawful money of the United States to her in hand paid by the said party of the second part at and before
15 the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and doth by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns forever, all that certain piece or parcel of land situate, lying, and being in the city of Washington, and being designated as lot four (4) upon the plat of subdivision made by Samuel D. King of original lots number ten (10), eleven (11), and twelve, (12), in square number one hundred and ninety-eight (198), as the same is recorded in liber N. K., page 268, in the surveyor's office of said city, on the 8th day of July, 1844, and which said lot, according to said plat, has a front of twenty-one feet on L street north, with a depth of one hundred and six feet, together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the said party of the first part, of, into, or out of the said piece or parcel of
16 ground and premises. To have and to hold the said piece or parcel of ground and premises and appurtenances unto and to the use of the said party of the second part, his heirs and assigns and successors in trust. In and upon the trusts, nevertheless, hereinafter mentioned and declared, that is, in trust to permit the said Susan Vigel, her heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply to and for their sole use and benefit, until default be made in the payment of the said note, or any proper cost, charge, commission, or expense in an' about the same.

And upon the full payment of all of said note and the interest thereon, and all other proper costs, charges, commissions, half commissions, or expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Susan Vigel, her heirs or assigns, at her or their cost.

And upon this further trust, that, upon default being made in the payment of the said note and interest, or any proper cost, charge,
17 commission, half commission or expense in and about the same, then, and at any time thereafter, to sell the said piece or parcel of

ground and premises at public auction upon such terms and conditions, and at such time and place, and after such previous public advertisement as the said party of the second part, his successors or heirs in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee-simple to and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money, and of the proceeds of said sale or sales; first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent. on the amount of the said sale or sales. Secondly, to pay whatever may then remain unpaid of said note, and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said Susan Vigel, her heirs or assigns.

In testimony whereof the said party of the said first part hath hereunto set her hand and seal on the day and year first hereinbefore written.

SUSAN $\underset{\text{mark}}{\overset{\text{her}}{+}}$ VIGEL. [SEAL.]

18 Signed, sealed, and delivered in the presence of—
R. H. MARSH.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, R. A. Marsh, a justice of the peace in and for the county aforesaid, in the said District, do hereby certify, that Susan Vigel, of said county and District, party to a certain deed bearing date on the twelfth day of August, A. D. 1870, and hereto annexed, personally appeared before me, in the county aforesaid, the said Susan Vigel, being personally well known to me to be the person who executed the said deed and acknowledged the same to be her act and deed.

Given under my hand and seal this 12th day of August, A. D. 1870.

R. H. MARSH, *J. P.* [SEAL.]

This is to certify that the within is a true and verified copy of a deed as recorded in liber 621, folio 385 et seq., one of the land records for the District of Columbia.

Washington D. C., January 23rd, 1875.

S. WOLF, *Recorder*,
GEO. F. SCHAYER, *Dep.*

19 *Exhibit No. 3, S. H.—Copy deed.*

John H. Holden to Susan Vigel. Release. Recorded April 14th, 1874, liber 745, folio 361.

This indenture, made this twenty-second day of March, in the year of our Lord one thousand eight hundred and seventy-two, between John H. Holden, of the city of Washington, D. C., trustee, of the first part, and Susan Vigel, of the same place, of the second part;

Whereas the said party of the second part heretofore made and executed a certain deed of trust, bearing date on the twelfth day of August, in the year eighteen hundred and seventy, and thereby conveyed to the said party of the first part, and to his heirs and assigns, all that certain piece or parcel of land situate, lying, and being in said city of Washington, and being designated as lot four (4) upon the plat of the subdivision made by Samuel P. King of original lots ten (10), eleven (11), and

twelve (12) in square numbered one hundred and ninety-eight (198), as the same is recorded in liber N. K., page 268, in the surveyor's
20 office of said city, on the eighth (8) day of July, 1844, and which said lot, according to said plat, has a front of twenty-one feet (21) on L street north, with a depth of 106 feet, in trust to secure certain indebtedness in said deed mentioned, as by reference to said deed, recorded as it is among the land records of Washington County, D. C., in liber No. 621, folio 385, will more fully at large appear;

And whereas the said debt has been paid and satisfied to the personal satisfaction *to* the said trustee, to whom the note has been produced and exhibited and by him marked "paid," the said party of the second part is thereby entitled to a reconveyance of said described premises, and to have the same released and discharged of and from all lien, claim, demand, or incumbrance by reason of said deed of trust or anything therein contained:

Now, therefore, this indenture witnesseth that the said party of the first part, trustee as aforesaid, for and in consideration of the premises aforesaid, and further the sum of one dollar lawful money of the United States to him now in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the
21 receipt whereof is hereby acknowledged, ha' granted, bargained, sold, released, and conveyed, and does by these presents grant, bargain, sell, release, and convey unto the said party of the second part, her heirs and assigns, forever, all the hereinbefore described premises, and all the rights, privileges and appurtenances to the same belonging or in any wise appertaining.

To have and to hold the same unto and to the use of the said party of the second part, her heirs and assigns, forever, as in her first and former estate, free, released, and discharged of and from all lien, claim, or incumbrance by reason of said deed of trust.

In testimony whereof the said party of the first , as trustee as aforesaid, has hereunto set his hand and seal on the day and year first hereinbefore written.

JNO. H. HOLDEN. [SEAL.]
GEO. W. STICKNEY, *Actuary.* [SEAL.]

Signed, sealed, and delivered in presence of—
R. H. MARSH.

DISTRICT OF COLUMBIA,
County of Washington, set:

I, R. H. Marsh, a notary public in and for the District and
22 county aforesaid, do hereby certify that John H. Holden, party to a certain deed bearing date on the twenty-second day of March, A. D. 1872, and hereto annexed, personally appeared before me in the said county, and the said John H. Holden being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and seal this 22nd day of March, A. D. 1872.

R. H. MARSH, [NOT'L SEAL.]
Notary Public.

This is to certify that the within is a true and verified copy of a deed as recorded in liber 745, folio 361 et seq., one of the land records for the District of Columbia.

Washington, D. C., January 23rd, 1875.

S. WOLF, *Recorder,*
GEO. F. SCHAYER, *Dep.*

23 *Subpœna.*

In the supreme court of the District of Columbia, March 5th, 1875.

SUSAN HOPP, COMPLAINANT,
vs.
SUSAN VIGEL ET AL., DEFENDANT'. } No. 4216. Eq. doc. 14.

The President of the United States to Susan Vigel, March 8th, 1875, in person, Charles H. Holden, Richard H. Marsh, March 11th, 1875, defendants:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.,*
By L. P. WILLIAMS, *Ass't. Clk.*

Subpœna returned.

Summoned all the def'ts.
March 11th, 1875.

ALEX'D' SHARP, *Marshal.*

24 *Answer of Susan Vigel.*

In the supreme court of the District of Columbia.

SUSAN HOPPS
vs.
SUSAN VIGEL, JOHN H. HOLDEN, & RICHARD H. MARSH. } Eq. No. 4216. Doc. 14.

The separate answer of Susan Vigel.

1st. The allegations in paragraph 1 of the bill are true.

2. She admits that complainant, Susan Hopps, is the daughter and sole heir at law of Richard Vigel, dec'd; that said Richard died in 1869. She admits that the said Richard at the time of his death held the legal title to the real estate described in paragraph 2, in the city of Washington, and that an interest in some land in Virginia descended to the compl't as the heir at law of Richard Vigel. She says that the
25 business transactions between her and the complainant are not truly stated in the bill, but that the facts are as follows: This defendant and the said Richard Vigel, dec'd, were sister and brother, she being unmarried and her brother being a widower with one child (the complainant). That in the year 1844 the said Richard Vigel and the defendant purchased from one Samuel D. King the lot of ground in the city of Washington described in the bill, paying there for it the sum of ninety dollars. This defendant paid the one-half of the consideration and her brother the other half. This defendant was employed as a clerk, and had good wages, and had made money at that time than her brother. That directly after the purchase of said lot she and her brother built a frame house upon such lot. The building of the house was paid for by them jointly out of their respective earnings, this de-

fendant being of the opinion that she paid more than her brother, but it was understood between them that they each owned one-half
26 of the property. That after the house was built she and her brother moved into it, and lived together there for several years, until her brother married a second time and moved out of this house to the one owned by his wife about the year 1849.

That after her brother left their house this defendant took one room and occupied it, and her brother rented out the rest of the house and received the rents from that time for about 20 years until his death. Her brother never accounted to her for her share of the rents, but she was entitled to one-half thereof after deducting a reasonable amount for the one room occupied by her.

This defendant says that she had implicit confidence in her brother, and when they bought the lot together she entrusted to him to do the business, and she always supposed the title was in them both until since her brother's death, when she found that the title was in his name alone, but she says that her brother when in life always recognized
27 and treated her as having an equal interest with himself in said property.

After her brother's death the complainant proposed to her to take her interest in the lot in Washington and let her have the personal property left by her father, consisting of a good horse and wagon and some other chattel property, and this defendant to pay the debts of her brother's estate, to which this defendant assented, and accordingly defendant paid the debts and cost of administration, amounting in the aggregate to about five hundred dollars, which, together with the first claim that defendant had against the estate of her brother for her share of the rents received by him during a period of about 20 years, much exceeded in amount the value of complainant's interest in the said house and lot.

It became necessary for the complainant to have a certain amount of money to protect her interest in the Virginia land, referred in the bill, from sacrifice or loss, and she applied to defendant to aid her in
28 procuring said money. They accordingly went to the office of the defendant Richard H. Marsh, he was then a justice of the peace, and stated to him the nature of their agreement respecting the property and their desire to raise some money for the purpose aforesaid and for other purposes, and he advised the complainant to make a deed to this defendant, and then this defendant should make a note and deed of trust for four hundred dollars, which was accordingly done, and the said note was negotiated by the said Marsh to the Freedman's Bank. But she says that said note for four hundred dollars was no part of the consideration for the lot conveyed to her by the complainant, and had been given by her to the complainant under the advice of the said Marsh to raise money for the complainant aforesaid, and that the said note was really an accommodation note on the part of this defendant, and was the debt of the complainant, and was rightfully paid out of her money.

29 She says that the lot when purchased by her and her brother was assessed for taxation a' 2 cts. per foot, and at the time of the conveyance by the complainant to her it was appraised for taxation at fifty cents per foot.

Defendant denies that she in any way, either by herself or in connection with Richard H. Marsh or any one else, committed, or attempted to commit, a fraud upon the complainant, and says that the transactions between them is truthfully herein stated, and was in complainant's opinion just and advantageous to the complainant, as her interest would

have been taken by the creditors of her father for his debts if this defendant had not paid them, and but for her assistance the complainant would also have forfeited and lost her interest in the Virginia land. Every statement or allegation in complainant's bill inconsistent with the facts herein stated she says is untrue.

3. And she prays to be hence dismissed with her costs.

SUSAN her + mark. VIGEL.

30 We do solemnly swear that we have read & heard read the answer by us subscribed and know the contents, and that the facts therein stated upon our personal knowledge are true, and that the facts therein stated on information and belief we believe to be true.

SUSAN her + mark. VIGEL.
RICHARD H. MARSH.
JOHN H. HOLDEN.

Sworn to and subscribed before me this fourth day of May, A. D. 1875.

N. CALLAN,
Notary Public.

31 *Answer of Holden.*

In the supreme court of the District of Columbia.

SUSAN HOPP *vs.* SUSAN VIGEL, RICHARD H. MARSH & JOHN H. HOLDEN.	Eq No. 4216. Doc. 14.

The separate answer of John H. Holden, one of the above-named defendants.

The defendant, John H. Holden, says that of his own personal knowledge he knows nothing of the matters and things set out in the bill of complaint, except that he was called upon by to execute a deed of release which is referred in the bill. He was not present when the deed was made, and knows nothing whatever of the facts. When called upon for that purpose he executed the deed of release. He has no interest of any kind in this controversy, and he prays to be hence dismissed with his costs.

JOHN H. HOLDEN.

32 John H. Holden, being duly sworn, says that he has read the answer by me subscribed, and knows the contents thereof, and that the facts therein stated upon my personal knowledge are true, and the facts therein stated upon information and belief I believe to be true.

Sworn to and subscribed before me this 4th day of May, 1875.

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Ass't Clk.*

33 *Answer of Rich'd H. Marsh.*

In the supreme court of the District of Columbia.

SUSAN HOPP *vs.* SUSAN VIGEL, RICHARD H. MARSH, JOHN H. Holden.	Eq. No. 4216. Doc. 14.

The separate answer of Richard H. Marsh, one of the above-named defendants.

1. He presumes the statements in the 1st paragrap*t* to be true.

2. He says that of his own personal knowledge he knows nothing of the transactions between the complainant and the defendant Susan Vigel prior to the 12th day of Aug., 1870. On or about that day they together, with the husband of the complainant, who is since dead, as respondent is informed, called at his office in the city of Washington, he being a justice of the peace at that time, and stated to him the nature of the business between them, and that they desired to raise
34 about four hundred dollars in money. He understood from both the complainant and Susan Vigel that *that* the defendant Vigel was the owner in equity of one-half of the lot described in the bill, and that the complainant had agreed with her consent to pay her father's debts and assist her to save her Virginia property, and the complainant was to have the personal property left by her father, which I understood to consist of a horse and wagon and some other things, and she was to convey to her aunt her interest in the house and lot. They had the deed conveying the property to Richard Vigel alone. Susan Vigel said she had discovered before her brother's death that the title was in him, and had wanted him to fix it so she should have her rights, and he said it would be all right, but died without fixing it. It was said by the parties that Richard had received the rents for many years, and in consideration of this, and Susan Vigel assuming to pay her brother's debts and let the daughter take the personal property, the complainant was to give up her interest in the lot to her aunt. Respondent*t* had nothing to do with the agreement between the
35 parties, except to make the necessary papers to carry it into effect, as the agreement was made before the parties called upon him.

It was the suggestion of respondent to raise money by Susan Vigel making a note to complainant and giving a deed of trust upon the property, but it was understood that it was an accommodation note for the benefit of complainant, and was to be paid out of the proceeds of the Virginia land when sold.

Respondent had no knowledge *if any* of any of the parties until they called upon him as aforesaid, and had no manner of interest in the transaction between , and simply in good faith executed such papers as he understood to be necessary to carry out their agreements theretofore made, and if there was any fraud or undue advantage on the part of the said Susan Vigel he had no knowledge of it, nor did he see or hear anything which led him to suspect any such thing. On the contrary, from the conversation between the two women and the husband of the compl't in his office, he supposed the transactions to be fair and honest, and the complainant fully understood the whole matter
36 at that time and expressed entire satisfaction with it. Respond-

ent is still of the opinion that the arrangement was fair and equitable between the parties. And having fully answered respondent prays to be hence dismissed with his costs.

RICHARD H. MARSH.

I do solemnly swear that I have heard read the answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and the facts stated therein upon information and belief I believe to be true.

RICHARD H. MARSH.

Sworn to and subscribed before me this 4th day of Ap'l, 1875.

R. J. MEIGS, *Clk*,
By R. J. MEIGS, Jr.,
Ass't Clk.

37 *Joinder of issue.*

In the supreme court of the District of Columbia, May 15th, 1875.

SUSAN HOPP
vs.
SUSAN VIGEL ET AL. } Equity, No. 4216. Doc. 14.

The plaintiff joins issue with the defendants.

JOHN E. NORRIS,
Solicitor for Pl'ff.

38 *Testimony of compl't.*

In the supreme court of the District of Columbia.

SUSAN HOPP
vs.
SUSAN VIGEL ET AL. } In equity, No. 4216. Doc. 14.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses begun and held on the 28th day of April, A. D. 1876, when the within depositions were taken, I, Robert J. Murray, an examiner in chancery, did cause to be personally present at the office of S. S. Henkle, esq., # 460 Louisiana avenue, in the city of Washington, in said District, Susan Hopp to testify on the part and behalf of the complainant in a certain cause now depending in the supreme court of the District of Columbia, wherein Susan Hopp is complainant and Susan Vigel et al. defendant'.

ROBERT J. MURRAY,
Examiner in Chancery.

39 WASHINGTON, D. C., *April 28th*, 1876.

SUSAN HOPP
vs.
SUSAN VIGEL ET AL. } In equity, No. 4216. Doc. 14.

Met pursuant to notice to take testimony in rebuttal for complainant. Present, John E. Norris, esq., counsel for complainant, and S. S. Henkle, esq., counsel for defendants.

Whereupon SUSAN HOPP, the plaintiff in this cause, being first duly sworn according to law, deposes and says as follows, to wit:

I am a resident of Washington City.

By Mr. NORRIS:

Q. Were you the daughter of Richard Vigel?

A. Yes.

Q. How old are you?

A. Forty-two the 2nd day of next month.

40 Q. On page 7 in the testimony of Richard H. Marsh he says that in a talk between the parties, meaning you and the defendant, that the conveyance of the property from you to her was in consideration that she, the defendant, had an interest in that property, and that she further agreed to pay certain debts against the estate of Richard Vigel; is that so? And if so, state what the conversation was; if not so, say.

A. It is not so.

Q. Was there an understanding between you, Mr. Marsh, and Susan Vigel that she, Susan, had an equitable interest of one-half in that "L" street property?

A. No, sir.

Q. In Mr. Marsh's testimony on page 9 he says "the defendant (meaning Mrs. Vigel) was to pay some debts of the estate of Richard Vigel and to assist the plaintiff (meaning you) to make what money she could out of the Virginia property." Was that a part of the agreement, or was there any such conversation as that?

A. Nothing like that made before Mr. Marsh.

41 Q. In his answer on the same page 9, he says "that the amount of rent received for these premises by your father was not discussed, but a kind of tacit agreement between the defendant and the plaintiff as to the satisfaction of the consideration paid for the property." Was there anything said by you in acknowledgement that rents had been received for which he was accountable to Mrs. Susan Vigel?

A. Not before him; there was not—

Q. Was anything said in the presence of Mr. Marsh in reference to rents received by your father, for which you were to account?

A. No, sir.

Q. In his answer to a question on page 9, he says "It was said by the parties that Richard had received the rents for many years, and in consideration of this and Susan Vigel's assuming to pay her brother's debts and let the daughter (meaning you) take the personal property" that you were to give up your interest in the property to your aunt, meaning Susan Vigel. Is that so?

A. No, sir.

Q. When and how came you to go to Mr. Marsh's office?

42 A. I wanted to pay the debt in Virginia on the property, and I went to my aunt, Mrs. Vigel, and she told me she knew a gentleman who would let me have the money to pay the debt, and she wished to know if I was willing to get it. I told her I was willing to get it, providing she got enough to pay Theodore Brooks.

Q. Was that the first and only time you were there?

A. That was the first time to get money that piece of property.

Q. Mr. Marsh says in his testimony on page 12, in answer to this question, "Q. State whether or not Susan Hopp was advised by you that she was conveying the L street property to Susan Vigel," to which he answers "She was. I fully explained to her the instrument." Did

he tell you that you were selling out your estate in that property and that the paper you signed and acknowledged conveyed your title in the said property to her?

A. No, sir, he did not.

Cross-examination waived by General Henkle.

her
SUSAN + HOPP.
mark

Attest:
ROB'T J. MURRAY.

Subscribed and sworn to before me this 28th day of April, A. D. 1876.
ROB'T J. MURRAY,
Examiner in Chancery.

43 WASHINGTON, D. C., *May 17th*, 1876.

Met pursuant to agreement of counsel.

Present, John E. Norris, esq., counsel for complainant, counsel for defendant not appearing, testimony tak*ing* subject to his objection and cross-examination.

Whereupon SUSAN HOPP was recalled.

By Mr. NORRIS:

Q. You have had brought to your notice Exhibit No. 1, a bill and receipt of Dr. A. T. Augusta, and Exhibit No. 2, bill of Lemuel Williams, Exhibit No. 3, a bill of John F. Murray, Exhibit No. 4, a bill of John H. Semmes & Co., all against your father, Richard Vigel. Miss Susan Vigel says that she paid those bills, and that the same with others were a part of the consideration named in the deed from you and your husband to her for the L street property. State whether that is so, and if not, where were the funds to come from to pay those bills?

44 A. It is not so; all the bills except Mr. Murray's bill were to be paid out of the rents of the property. I don't know anything about Mr. Murray's bill.

Q. Exhibit No. 5 has been brought to your notice. State whether you ever authorized any one by the name of Susan Byge to pay that bill.

A. No, sir.

Q. Exhibit No. 6 (2nd instal'ment tax for paving alley) has been brought to your notice. Did you ever authorize a person named Susan Byge to pay that?

A. No, sir.

Q. Exhibits No. 7 & 8 (tax bills, one for 1869 & the other 1870, both November) have been brought to your notice. Did you or not authorize the payment of those bills?

A. I did not.

Q. Exhibit No. 9 has been brought to your notice. Did you ever authorize any one to pay those bills?

A. No, sir.

Q. Exhibit No. 10 shows that on final settlement of the estate of your father there was $192.98, balance due the estate. Did you receive that or any property as the equivalent of it?

A. I received a horse and wagon.

Q. What was the horse and wagon worth?

45 A. I don't know.

Q. Exhibit No. 11 states that there was $40.00 expenses for your portion of attorney's fees on the Sebastian Spring farm. Out of what was that paid?

A. Out of the $400.00, the money we got from Mr. Marsh.

Q. Can you state that there accounts for which receipts are here filed alleged to have been paid by Susan Vigel were paid out of her funds or out of the money that you borrowed, as you state, through Mr. Marsh, or was it to be a part of the consideration for that alleged deed which they say you made for $1,000.00?

A. They were to be paid out of the rent of property.

Q. Have you ever received any rents from that L street property since the decease of your father, Richard Vigel?

A. No, sir.

Q. Mr. Marsh, in his examination, says that he explained to you when you and your husband executed that deed for the L street property for the consideration of $1,000.00, that he explained to you that you parted with your whole title and interest in it. Is that so?

46 A. No, sir.

Q. What did you understand by the papers that you executed, and what was the agreement at the time between you & Miss Vigel?

A. The understanding was, that I was to have the $400.00, and the property was to be held until I paid the money, and then it was to be turned back to me.

Q. Did you ever get any benefit from that $400.00 after it was paid by you?

A. No, sir.

her
SUSAN + HOPP.
mark

Witness:
ROB'T J. MURRAY.

Subscribed and sworn to before me this 17th day of May, A. D. 1876.

ROB'T J. MURRAY,
Examiner in Chancery.

S. S. Henkle waives his right to cross-examination.

ROB'T J. MURRAY,
Ex'r in Chancery.

47 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Robert J. Murray, examiner in chancery, do hereby certify that, in pursuance of notice given, the foregoing deposition was taken down and by me reduced to writing, in the presence of and from the statement of the witness, at the time and place designated in the caption thereof, and was then and there by me read over to the witness, and by her subscribed in my presence, and the presence of counsel for all parties who were then and there attending, the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

ROB'T J. MURRAY,
Examiner in Chancery.

48 *Testimony of def't.*

In the supreme court of the District of Columbia.

SUSAN HOPP
vs.
SUSAN VIGEL ET AL. } In equity, No. 4216. Doc. 14.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses, begun and held on the 19th day of January, A. D. 1876, and continued from time to time by me until the 29th day of April, A. D. 1876, when the within depositions were taken, I, Robert J. Murray, an examiner in chancery, did cause to be personally present at the office of S. S. Henkle, No. 460 Louisiana avenue, N. W., in the city of Washington, in said District, Gabriel Coakley, Richard H. Marsh, and Susan Vigel, to testify on the part and behalf of the defendants in a certain cause now pending in the supreme court of the District of Columbia wherein Susan Hopp is complainant and Susan Vigel et al. are defendants.

ROB'T J. MURRAY,
Examiner in Chancery.

49 HOPP
vs.
VIGEL ET AL. } In equity, No. 4216. Doc. 14.

THURSDAY, *Jan'y 13th*, 1876.

Met pursuant to agreement of counsel, to take testimony for defendant'.

Present, John E. Norris, esq., counsel for complainant. There being neither witnesses present nor counsel for defendants, adjournedto meet Wednesday, January 19th, 1876, at two o'clock p. m.

50 HOPP
vs.
VIGEL ET AL. } In equity, No. 4216. Doc. 14.

It is agreed by the defendant' and plaintiff that John A. Gray, a witness who was in attendance heretofore but did not give his testimony, would state, if present:

That the plaintiff received from the sale of the lands in Virginia in which her father had a share, as her part of the proceeds, the sum of about $750,00 about the time or a little before the said promissory note from Susan Vigel to Henry Hopp became due and payable.

Taken down in writing by me in the presence of John E. Norris, counsel for defendants, this 19th day of January, A. D. 1876.

ROB'T J. MURRAY,
Examiner in Chancery.

51 WASHINGTON, D. C. *Jan'y 19th*, 1876—2 o'clock p. m.

Met pursuant to adjournment

Present, John E. Norris, esq., complainant's counsel, and S. S. Henkle, esq., counsel for defendants.

Whereupon Gabriel Coakley, a witness of lawful age, a resident of

Washington City, produced, sworn, and examined by and on behalf of the defendants, deposes and says as follows, to wit:

I live on H street, No. 2017, in this city; I am now about 50 years old; I am now a laborer in the Government Printing Office; I am acquainted with Susan Vigel; I have known her certainly 30 years. I lived in the same house with her; we were both employed by Thomas Cochran; she was cook and I was coachman. This was about 25 or 30 years ago.

I knew Richard Vigel, her brother, and knew him when Harrison was inaugurated. I was intimate with him from that time until
52 his death. Richard Vigel was not married when I knew him. I don't remember whether he was a widower or not. I don't know whether Susan Vigel was married or not.

I have heard Susan say that they had purchased a lot, she and her brother Richard. This was about 30 years ago. I can't state definitely the time. I did not leave from whom the lot was purchased. The lot was on L street, near 16th street.

Susan Vigel got me to leave money at her brother's as I passed by. This she did very often. I passed by where he lived. I can't say how often I carried money there, but several (three or four times) I am certain of. I never saw the amounts I carried, as the money was wrapped up.

Q. What did you understand to be the purpose of Susan Vigel in sending this money to her brother?

(Objected to by Mr. Norris.)

A. She told me that she had given me the money to give to him as she had promised to help to pay for the property.

(Objected to by Mr. Norris.)

Q. What, if anything, did you ever hear Richard Vigel say
53 about having purchased this property for himself and his sister?

(Objected to by Mr. Norris.)

A. He told me that they would like to have a home, and were trying to get a home for themselves.

Q. What, if anything, did Richard Vigel say to you in regard to the money sent to him by his sister being to pay upon the lot or to be used in building the house?

A. I don't recollect anything more than I have stated; that they were trying to get a home. I don't know when they went to live in the house.

No cross-examination.

G. COAKLEY.

Subscribed and sworn to before me this 19th day of January, A. D. 1876.

ROB'T J. MURRAY,
Examiner in Chancery.

54 RICHARD H. MARSH sworn and examined.

By Gen'l Henkle:

Q. Are you one of the defendants in this case?

A. I am joined in the suit, I believe.

Q. What was your business in August, 1870?

A. I was a collection & claim agent and an acting justice of the peace.

Q. Give a narrative of what took place in your office between the

plaintiff, Susan Hopp, and the defendant, Susan Vigel, on or about the 12th day of August, 1870, in regard to the conveyance of a lot of ground in the city of Washington from the plaintiff to the said Susan Vigel and the making of a deed of trust by Susan Vigel to John H. Holden to secure a note for $400.00 made to Henry Hopp, stating fully and particularly the agreement between the said parties which resulted in the execution of these deeds.

(Objected to by Mr. Norris on the ground that any agreement in relation to the sale of real estate is invalid and not binding upon the parties unless it be in writing; this objection being restricted to the latter clause of the question.)

55 A. The plaintiff and the defendant both came to my office about that date, and at their request I drew up a deed conveying the property described therein from the plaintiff to the defendant. At the same time Henry Hopp, being present, joined in the conveyance. Subsequently, on the same day, I drew a note for the sum of $400.00, payable 12 months after date to the order of Henry Hopp, which was signed by the defendant, and to secure the payment thereof she executed a deed of trust conveying said property to John H. Holden, as trustee. During the execution of the papers there was some talk between the parties, that the conveyance of the property from plaintiff to defendant was in consideration; that the defendant had an interest in the property, and that she had further agreed to pay certain debts against the estate of Richard Vigel, and for the further assistance in saving certain property in Virginia; that the defendant executed a note payable to Henry Hopp, referred to above, which note was to be converted
56 into money, for the purpose of saving said property in Virginia from being lost in which Richard Vigel had an interest.

Q. Who was Henry Hopp?

A. He was the husband of the plaintiff.

Q. What did you understand from the parties at that time to be the extent of the equitable interest which Susan Vigel had in the property in controversy?

(Objected to by Mr. Norris.)

A. My understanding was that Susan Vigel owned and equitable interest in one-half of the property.

Q. How did you get that understanding?

A. From the conversation between the plaintiff and defendant that day in my office.

(Objected to by Mr. Norris because it contradicts the record.)

Q. What did you understand from the conversation between the parties Mrs. Hopp was to receive for her interest in the property?

(Objected to by Mr. Norris because the deed speaks for itself.)

57 A. As I before stated, that the defendant was to pay some debts of the estate of Richard Vigel, and assist the plaintiff to make what money she could out of the Virginia property.

Q. What, if anything, was said by the parties about Richard Vigel's having for many years receiving the rents of the property and as to this rent entering into the consideration for the conveyance by the plaintiff to the defendant?

(Objected to by Mr. Norris.)

A. There seemed to be a general conversation about the matter that day but the amount of rent was not discussed, but a kind of tacit agreement between the plaintiff and defendant as to the satisfaction of the consideration paid for the property.

(Objected to by Mr. Norris on the ground of an inference drawn by the witness without facts.)

Q. You say in your answer filed in this cause "It was said by the parties that Richard had received the rents for many years and in consideration of this, and Susan Vigel's assuming to pay her brother's
58 debts and let the daughter take the personal property, the complainant was to give up here interest in the property to her aunt." Was this a correct statement of the transaction between the parties, as you learned it from the conversation between them at the time of making these deeds, or not?

(Objected to by Mr. Norris.)

A. I think it was.

Q. What was the agreement between the parties as to the payment of the $400.00 note executed by Susan Vigel to Henry Hopp?

(Objected to by Mr. Norris on the ground that it is an attempt to vary or contradict a written instrument by parol testimony.)

A. It was an accommodation note for the purpose of raising money to save the property in Virginia or save what they could out of the proceeds.

Q. What I desire to know is whether the note was to be paid out of the proceeds of the property in Washington or out of the proceeds of the Virginia lands when sold?

59 A. I understood it was to be paid out of the proceeds from sale of Virginia lands, and I will give the reason I so understood it. The papers, the deed, deed of trust, and note, were left with me, with instructions by both parties to get the money for them on the note, which I did, and paid the money to the defendant in the presence of the plaintiff. This was several days after the making of the instrument. They both left my office and said they were going to Alexandria, Virginia, to pay off this claim that was against the property.

Q. When did you first make the acquaintance of Susan Vigel and Susan Hopp?

A. A few days previous to the date of those papers—deed, deed of trust, &c.

Q. State how you came to make their acquaintance and what transpired at that time.

A. They came to my office together to see me about this business a few days before the conveyance. They said they wanted me to make some papers for them and spoke of having some property here and some in Virginia belonging to Richard Vigil's heir.

60 State whether or not Susan Hopp and her husband were at the time of the making and execution of these papers fully and clearly informed by you as to their character.

(Objected to by Mr. Norris.)

A. They were.

Q. State whether or not Susan Hopp was advised by you that she was conveying the "L" street property to Susan Vigel?

A. She was. I fully explained it to her, the instrument.

Q. State whether or not you fully explained to her and her husband the transaction with regard to the deed of trust and the note.

A. I did.

Q. State whether or not they were satisfied with these papers.

A. They apparently were; I never heard any objections until within the last year or two.

Q. State whether or not the papers prepared by you and executed

by the parties expressed the agreement and contract between the parties as you learned it from them.

(Objected to by Mr. Norris as there has been no valid contract or agreement proved independent of the deeds.)

A. I think they do.

61 Q. State what, if any, interest you had in this trans' to defraud the plaintiff.

A. None whatever.

Q. State what agreement, conspiracy or confederation there was between you and Susan Vigel to cheat the plaintiff out of her property.

A. None whatever.

Q. State whether at the time of the execution of the deed by the plaintiff and her husband to the defendant Susan Vigel you told the plaintiff, or intimated or in any way gave her to understand that the paper she was executing was a deed of trust to secure the $400.00 note or not.

A. I did not.

Q. Did you or did you not expressly explain to her that the paper that she was executing was a deed conveying in fee-simple all her interest in the "L" street property to her aunt?

A. I did.

Subscribed and sworn to before me this 19th day of January, A. D. 1876.

ROB'T J. MURRAY.

Close of examination-in-chief.

Adjourned to meet Thursday, January 20th, 1876, at 2 o'cl'k, p. m.

62 THURSDAY, *January 20th*, 1876—two o'c'k p. m.

Met pursuant to adjournment.

Present, John E. Norris, esq., counsel for complainant, and S. S. Henkle, esq., counsel for defendants.

Whereupon SUSAN VIGEL, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and on behalf of the defendants, deposes and says as follows:

By Gen'l HENKLE:

Q. What is your age?

A. I could not tell exactly.

Q. What relation to you was Richard Vigel?

A. My brother.

Q. Which was the older, he or you?

A. He was the oldest.

Q. Where did you live in 1844, or along there?

A. I don't know. I can't remember the year, but I lived with several folks.

Q. State whether your brother and you ever at any time purchased a lot together; and, if so, where it was.

(Objected to by Mr. Norris, because the record shows that the
63 property was conveyed to Richard Vigel solely, and that the testimony is objectionable on another ground, namely, that Richard Vigel has deceased, and that she is incompetent to give testimony as to an interest in his estate.)

A. Yes; the lot was on L street, between 15th & 16th streets.

Q. Stat', if you can, where you lived at the time of this purchase.

A. At Captain Corcoran's.

Q. What did you do at Captain Corcoran's?
A. I was cook there.
Q. What wages did you get?
A. Nine dollars a month.
Q. Have you any idea as to how long ago that was?
A. I have not; but it was a good while ago.
Q. What was your brother doing at that time?
A. Carrying the hod.
Q. What was the price of the lot?
A. It was $90.00 we paid for it.
Q. How much of the $90.00 did you pay, and how much did your brother pay?
A. I sent the money to him, and he paid it all. I sent it to him
64 by Gabriel Coakley, at the end of every month. Sometimes my brother came to the house, and I gave it to him.
(All the preceeding testimony objected to by Mr. Norris, as being a variance and contradiction of the deed upon record, and the witness being incompetent to testify to her interest against the estate of a deceased person.)
Q. What part of the $90.00 did you pay?
A. I think I paid half of it, if not more.
(Question and answer objected to by Mr. Norris, for reasons above stated.)
Q. State whether or not you and your brother built a house on the lot.
A. Yes; we did.
Q. How much of the money that it cost to build the house did you pay, and how much did your brother pay?
A. The house cost $500.00, and he set it down that I paid $250.00.
Q. After the house was finished, what was done with it?
A. My brother rented it.
Q. Did you live in it?
A. I did not live in it for some time after it was finished.
65 Q. How long did your brother rent it?
A. He rented part of it up to his death.
Q. How long did he rent the whole of it before you moved into it?
A. Nearly two years.
Q. Who collected the rents?
A. He did.
Q. What part of the rents did he pay to you?
A. He paid none to me.
(All the testimony preceeding relating to the cost of the house, the amount the witness paid, and the rents collected by the intestate, and his occupancy of the house, objected to by Mr. Norris as incompetent.)
Q. How much rent did he receive from the house when he rented the whole of it?
(Objected to by Mr. Norris.)
A. $15.00 a month.
Q. After you moved into the house, how much of it did you occupy?
A. One room.
Q. Did your brother occupy any part of the house while you were there?
66 A. He occupied one room and I occupied one room and we added two more rooms to it.
Q. How long did your brother continue to live with you in the house?
A. He was there two years before he got married.
Q. Did he leave the house when he got married?

A. Yes.

Q. While he was living in the house with you, what was done with the part of the house you and he did not occupy?

A. He rented it out.

Q. What did he get for the part he rented?

A. He got from $4.00 to $5.00 per month.

Q. How much of that rent did he give to you?

A. He gave me none.

Q. After he got married and moved away what was done with the house?

A. He rented all the rooms except the one I occupied.

Q. What did he get for it?

A. He only got $5.60 for the front room from the time the house was built, and $4.00 for the back room, and during the war he got $25.00 a month.

Q. How many rooms were in the house when it was first built?

67 A. Four.

Q. How many rooms were afterwards added?

A. Two. The house then had six rooms. My brother rented five and I had one.

Q. How long did your brother continue to rent and receive the rents from these five rooms?

A. Until his death.

Q. Did you ever pay any rent to your brother for your room?

A. No, sir.

Q. Why did you not?

A. Because I was entitled to the room. I had paid enough. I helped to pay for the property.

Q. When did you first discover that your brother alone held the title to the lot?

A. When in his last sickness. He was only sick four weeks.

Q. What took place between you and him in his last sickness with regard to the title?

(Objected to by Mr. Norris, and all the testimony previous not already objected to, as being incompetent.)

A. When he was sick I went to him and told him I would like for him to settle with me before he got worse, as if he died his
68 daughter might put me out of the house. He said no; that he had furnished a place for her and had borrowed some money from me to help pay for her place, and that she could stay where she was, and I could stay where I was and have the house.

Q. That was the agreement between you and Susan Hopp with regard to the property and the settlement of all your affairs when you were before Esquire Marsh in August, 1870?

(Objected to by Mr. Morris, unless it was in writing.)

A. Before we went to Esq. Marsh she said for me to pay what I could of my brothe's bills and she would pay me back; then my money gave out, and a bill came in from Virginia. We then went to Esq. Marsh, and then we stated the case to him and wanted to borrow some money. Mr. Marsh told us that if Mrs. Hopp would sign her rights to me, he could let us have all the money we wanted. Mr. & Mrs. Hopp went down and signed their rights to me.

Q. State whether Mr. Marsh read and explained to you and Mrs. Hopp the papers that he had drawn before they wers signed by you and her, or not?

(Objected to by Mr. Norris as leading.)

69 A. He explained it to her and she was satisfied with it.

Q. Did you and Esq. Marsh ever enter into any agreement or arrangement to cheat Mrs. Hopp out of her property or not?

(Objected to by Mr. Norris as leading.)

A. No, sir; we had no agreement at all.

Q. Have you ever been married?

A. No, sir.

Q. What personal property did your brother leave?

A. A horse and wagon and house furniture.

Q. What became of this property?

A. Mrs. Hopp got it.

Q. Who paid her father's debts?

(Objected to by Mr. Norris.)

A. I did.

Cross-examination by Mr. NORRIS:

Q. How long have you occupied that house?

A. I only occupied one room in it, from two years after it was built.

Q. When was it built?

A. I could not tell what year.

70 Q. Who has occupied it since your brother's death?

A. Several persons have been in it. I still have my room.

Q. Who were they and how were they there?

A. They were tenants of mine.

Q. Had you anything to do with the building of the house, and if so, what was it?

A. No, sir.

Q. Had you anything to do with purchasing the lot, except what you have stated about furnishing the money?

A. No, sir. He saw that the lot was for sale and came and told me about it.

Q. Where did your brother live at the time this lot was purchased?

A. With a man named Solomon. He kept a room there until this house was built.

Q. What business did he follow all his lifetime?

A. His trade was a tanner, and after he learned his trade he carried a hod awhile and then drove a furniture wagon until his death.

Q. When you and he lived together, you occupying a room and he a room, who kept house?

71 A. There was no keeping the house. I was there in the night and gone in the morning.

Q. Who did his cooking and washing at that time?

A. I did the washing, and sometimes I cooked at night and sometimes he cooked himself.

Q. You say that after this house was built, and during the whole time he occupied it whilst you had a room in it, your brother collected the rents to his own use, if you paid half for the ground and half for the building the house, why did not you claim some of those rents?

A. Because he always put me off, saying he would settle up some day or another, but never did settle up.

Q. You first discovered, you say, that your brother had taken a conveyance of this lot to himself during his last illness; how came yo' to discover that?

A. I saw he was sick and was getting no better, and I thought it was time for me to see what he was going to do, as he had never made a settlement with me.

Q. What did you expect him to do if you knew that you owned half the property?

A. Because he never gave me my paper.

72 Q. What paper?

A. The paper entitling me to half. I should have had the paper.

Q. Then you never saw the deed for this property, and never knew how it was made, up to the time of your brother's last sickness?

A. No, sir.

Q. Did you ever inquire after it before that time?

A. Yes, sir.

Q. When and where, and of whom?

A. Often he would come to my room after he was married, and I would ask him to settle up with me and give me papers to show what I had.

Q. Then you did not learn for the first time in his last sickness how this deed was?

A. I did not until then.

Q. Had you any interest in that land in Virginia upon which Mrs. Hopp owed some money?

A. Only I tried to save it. I had only an interest to try and save it.

Q. Did Mrs. Hopp tell you that she wanted to convey that house and lot to you, and that she wanted to borrow $400 from you to pay
73 on the redemption of that Virginia property, or did she say that she wanted to borrow 400 and would give a deed of trust on the house and lot?

A. She told me she would not pay her father's debts, and she wanted to give a deed of trust to me.

Q. What was the amount of her father's debts, and to whom were they owing?

A. He owed several debts and his burial expenses and doctor's bill, and Mr. Murray and Mr. Semmes. The bills will show, and I have the receipts.

Q. Did you pay her $1,000 when she made that conveyance to you on Aug. 12th, 1870, of the house and lot?

A. No; what was I to pay her $1,000 for?

Q. Did you pay her anything?

A. No; I did not pay her anything. I settled up her father's debts.

Q. You gave a note at that time for $400, payable to Henry Hopp, her husband, and Mr. Marsh got it cashed. Who received that money from Mr. Marsh?

A. I received it.

Q. What did you do with it?

74 A. Mrs. Hopp and went over to Virginia to pay it on the Virginial and. She paid it.

Q. Did she pay you that money back?

A. No, sir; I kept the taxes down until we sold the Virginia place.

Q. Who paid the note for $400?

A. I and Susan Hopp took the money from the Virginia lands and went up to the bank and paid it.

Q. Had you and Mrs. Hopp any conversation about this property before you went to Mr. Marsh's office, and if so, what was it?

A. Yes; she tried to borrow money and failed. She came to me and I loaned her $50, and when the taxes came due she was going to give it up. I told her to give it to me and I would pay; that I was not going to let all my labor go for nothing.

Q. Did she say she wanted to borrow money on the house you were living in and could not do it?

A. Yes, sir.

Q. How much were you to give her for her half interest in that property?

75 A. No bargain made as to what I was to give her.

Q. Had you $50 of claims against the estate of your brother which you had paid?

A. It was more that that.

Q. How much more?

A. I could not tell.

Q. How did you make up $1,000?

A. The property, I believe, was valued at $1,000.

Q. What security did you take from Mrs. Hopp for the $400 you advanced to her and put a trust on this property for?

A. No security at all.

her
SUSAN + VIGEL.
mark.

Attest:
ROB'T J. MURRAY.

Subscribed and sworn to before me this 20th day of January, A. D. 1876.

ROB'T J. MURRAY,
Examiner in Chancery.

Adjourned to meet Tuesday, January 25th, 1876, at two o'clock p. m.

76 TUESDAY, *January 25th*, 1876—two o'cl'k p. m.

Met pursuant to adjournment.

Present, neither counsel nor witnesses.

Whereupon, adjourned to meet at time to be agreed upon by counsel.

THURSDAY, *February 3rd*, 1876—two o'clock p. m.

Met pursuant to agreement of counsel.

Present, John E. Norris, complainant's attorney.

Counsel for defendants being absent, adjourned to meet Friday, February 4th, 1876, at two o'cl'k p. m.

77 FRIDAY, *February 4th*, 1876—two o'cl'k p. m.

Met pursuant to adjournment.

Present, John E. Norris, esq., counsel for complainant, and S. S. Henkle, esq., counsel for defendants.

The witness not being present, after waiting forty minutes, adjourned to meet at call of counsel.

78 *Solicitor's notice.*

In the supreme court of the District of Columbia the 22nd day of April, A. D. 1876.

SUSAN HOPP
vs.
SUSAN VIGEL ET AL. } No. 4216. Doc. 14.

Take notice that I desire the evidence to be adduced in this cause to

be taken orally before Robert J. Murray, one of the examiners of this court, at such time and place as he may fix by order and give you notice of.

S. S. HENKLE,
Solicitor for Defendants.

To JOHN E. NORRIS, Esq.,
Solicitor for Complainant.

Examiner's notice.

Take notice that I shall proceed to take testimony in the above-entitled cause on behalf of the defendant' and at the instance of S. S. Henkle, esq., solicitor for defendants, on Wednesday the 26th day of April, A. D. 1876, at the office of S. S. Henkle, esq., No. 460 La. ave., N. W., Washington City, D. C., at one o'clock p. m.

By order:

ROB'T J. MURRAY,
Examiner in Chancery.

To JOHN E. NORRIS, Esq.,
Solicitor for Complainant.

Service of notice by solicitor for defendants and of notice of examiner, acknowledged this 2nd day of Apr., A. D. 1876.

JOHN. E. NORRIS,
Solicitor for Complainant.

79 WEDNESDAY, *April* 26th, 1876.

Met pursuant to notice given.

Present, S. S. Henkle, esq., counsel for defendant, and John E. Norris, esq., counsel for complainant.

Whereupon the cross-examination of Richard H. Marsh was begun.

By Mr. NORRIS:

Q. In your examination-in-chief you state that Miss Vigel & Mrs. Hopp and her husband met at your office and an arrangement was made and an agreement that she (Mrs. Hopp) should convey the L street property in controversy to her (Miss Vigel) for the consideration of $1,000. Was any money paid, and if not, what was the consideration?

A. The consideration was as I have stated in my examination-in-chief.

Q. You state that you prepared a deed and a deed of trust, as set forth in the bill and answer, and that you raised the sum of $400,
80 which was handed over to the plaintiff. What was your understanding at the time that this money was to be used for?

A. That it was to be used, as set forth in my examination-in-chief, to save certain property in Virginia.

Q. Was it a loan to be repaid?

A. I so understood it.

Q. Was it repaid?

A. I understood it was. I have no personal knowledge of that fact.

Q. In answer to a question, you state in your examination-in-chief "that the defendant was to pay some debts of the estate of Richard Vigel and to assist the plaintiff to make what money she could out of the Virginia property." What debts were those?

A. They were the expenses of Richard Vigel's last illness, some other debts against his estate, and his funeral expenses.

Q. What was the amount of those debts?

A. I don't remember now exactly.

Q. Was there any statement of the amount made at the time of this alleged negotiation?

A. I think there was.

81 Q. Any statement or figures presented at the time showing that amount?

WITNESS. What amount?

Mr. NORRIS. The debts the estate owed.

A. If I remember right it was about $400 or $500.

Q. Any statement of figures presented?

A. Yes; just as I have stated; the amount was between three and five hundred dollars.

Q. Anything in writing to show the amount?

WITNESS. In writing?

Mr. NORRIS. Yes.

A. Yes, sir; the deed of conveyance was the only writing made.

Q. That is all that showed the amount due from the estate?

A. Yes, sir.

R. H. MARSH.

Subscribed and sworn to before me this 26th day of April, A. D. 1876.

ROB'T J. MURRAY,
Examiner in Chancery.

82 Whereupon ELIZABETH NEAL, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and on behalf of the defendant, deposes and says as follows, to wit:

By Mr. HENKLE:

Q. State whether you are acquainted with Susan Vigel, the defendant in this cause, and whether you knew Richard Vigel, her brother, in his lifetime. If so, when your acquaintance began with them, and how intimately did you know them?

A. I have been acquainted with them both about thirty years; Richard & Susan Vigel were neighbors of mine. They did not live there when I first knew them. I knew them before they bought the lot.

Q. How near do you live to the property in controversy?

A. The side of my lot joins their back fence.

Q. State, if you know, who bought and paid for the lot in controversy, and who built the house.

83 (Objected to by Mr. Norris, for the reason that th'res is a deed upon record in favor of Richard Vigel, and which ought not and cannot be contradicted by parol testimony, which shows that Richard Vigel bought and paid for said lot the consideration of which is specified in the deed.)

A. Mr. Vigel told me that he and his sister were buying it and paying for it, and intended to put up a house on it, and afterwards they did put it up.

Q. What did Richard Vigel say to you about his sister assisting to pay for the lot and to pay for the house?

A. He told me that he and his sister were going to build the house together, and he told me that they built it.

Q. What did he say, if anything, about his sister's furnishing money to pay for the lot and building the house?

A. He said, at that time, that she was making every other payment on the house and lot.

(Answer objected to, as contradictory to the record filed in the cause by Mr. Norris.)

84 Q. State what Richard Vigel said to you, if anything, in regard to what was to become of the property at his death, if he should die first.

(Objected to by Mr. Norris.)

A. He said if he died it was to belong to his sister, and if she died it was to be his.

(Answer objected to by Mr. Norris.)

Q. What did he say, if anything, with regard to providing for his d'ughter Susan?

A. He said he was going to buy a house and lot and give it to her, so as she would not interfere with her aunt. This was told me about the time he bought the property.

Q. State whether or not you had frequent conversations with Richard Vigel upon this subject, and whether or not his statements were always to the same effect?

(Objected to by Mr. Norris, as leading.)

A. He told me when he was buying the property for his daughter, and when he was buying this property on L street.

(Answer objected to by Mr. Norris.)

Q. What business was Susan Vigel in at that time?

85 A. She was cook at Mr. Thomas Corcoran's.

Q. Do you know what wages she got?

A. No, sir.

Cross-examination by Mr. NORRIS:

Q. How old are you?

A. I guess about 51 or 52.

Q. When were these conversations with Mr. Richard Vigel that you have spoken of?

A. When he was buying the lot, and when he was building the house. I could not tell the day or the year, but I know he was there and told me.

Q. Then you don't know the year or the month?

A. No, sir, I don't.

Q. Were you a relation of his?

A. No, sir.

Q. How does it happen that he talked to you about all his matters?

A. He was talking to my mother at the time, because she was buying property at the same time, and they were seeing which was the best way to get it.

86 Q. Then all you know in reference to this property you derive from conversations which you heard between your mother and Richard Vigel?

A. We used to be all talking together.

Q. Did you not state that you were young at the time?

A. Yes, sir.

Q. How old were you?

A. About 16 or 17; I don't know exactly.

Q. How does it happen that you recollect so well, from the time you were 16 or 17 up to the present time, conversations that took place in your presence between your mother and Richard Vigel?

A. I recollect it as distinctly as if it was yesterday.

Q. Did anybody call your attention to the matter, and if so, who was it?

A. No, they did not particularly call my attention.

Q. How did you happen to come here?

A. Miss Susan Vigel asked me to come.

Q. When?

A. It was in last December, I think, just before I went to the country.

Q. What did Mrs. Susan Vigel say to you?

A. She only asked me to come down here and testify as to what I knew about her brother's property.

87 Q. Did she tell you what property it was?

A. She did; the property on L street.

Q. Did she tell you she had been sued?

A. Yes.

Q. Did she ask you what you knew about it?

A. She did not.

Q. Did you tell her what you knew about it?

A. I did not. She told me I could tell the court whatever I knew about it.

Q. How did she know that you knew anything about it?

A. She knew that I knew her brother, and we often talked about our property together.

Q. Do you know Mr. Richard H. Marsh?

A. I only know him when I see him.

Q. Did he say anything to you about this matter?

A. He did not.

Q. Not a word?

A. No, sir; he never said a word to me about this matter. He said I would have to come down and give my testimony.

Q. When did he say that, and where?

A. At his office, the first time he ordered me to come down here.

88 Q. Did he tell you what he wanted you to testify to?

A. He only said he wanted me to tell about Richard and Susan Vigel's property.

her
ELIZABETH + NEAL.
mark.

Attest: ROB'T J. MURRAY.

Subscribed and sworn to before me this 26th day of April, A. D. 1876.

ROB'T J. MURRAY,
Examiner in Chancery.

89 SATURDAY, *April 29th*, 1876.

Met pursuant to notice.

Present, S. S. Henkle, esq., counsel for defendants, and John E. Norris, esq., complainant's counsel.

Whereupon SUSAN VIGEL was recalled.

By S. S. HENKLE:

Q. Papers marked Exhibit No. 1, being two receipts, one for $15.00 and the other $16.00, are receipts from Dr. Augusta for medical attendance on Richard Vigel, shown to witness, and

Q. What are these papers?

A. Receipts from Dr. Augusta for money paid by me.

(Papers—Exhibit No. 2—shown witness.)

Q. What are these papers?

A. They are the bill and receipts of the undertaker for funeral expenses of Richard Vigel paid by me.

(Paper marked Exhibit No. 3 swown witness.)

Q. What paper is that?

90 A. Receipt for money paid by me to Mr. Murray for groceries purchased by Richard Vigel, being a debt against his estate.

(Paper marked Exhibit No. 4 shown witness.)

Q. What paper is that?

A. A receipt from John H. Semmes for groceries against the estate of Richard Vigel paid by me.

(Papers marked No. 5 shown witness.)

Q. What papers are those?

A. Receipts for taxes paid by me.

(Papers marked Exhibit No. 6 shown witness.)

Q. What papers are those?

A. Receipts for taxes for paving alley, which were paid by me; sometimes I am called Susan Byger; that was intended for me.

(Paper marked Exhibit No. 7 shown witness.)

Q. What paper is that?

A. A tax receipt for money paid me.

(Paper marked Exhibit No. 8 shown witness.)

Q. What paper is that?

A. A tax bill which is not receipted, but I paid it.

(Papers marked Exhibit No. 9 shown witness.)

Q. What papers are those?

A. Receipts for taxes paid by me.

91 (Paper marked Exhibit No. 10 shown witness.)

Q. What paper is that?

A. My administration account showing payment by me of $27.18 costs of probate and administration.

(Paper marked Exhibit No. 11 shown witness.)

Q. What paper is that?

A. A receipt to Mrs. Hopp for $40.00 for her portion of expenses on Sebastian Spring farm, lawyers' fees, &c.

Q. Who paid the money?

A. Susan Hopp paid the money, but it was my money; I gave it to her to pay it.

Q. It seems from the account filed by Susan Hopp, administratrix, for settlement that she returned $244.40 as the amount of personal property inventoried; what became of that personal property?

A. She got it all except a half dozen chairs which she gave me.

(Counsel for plaintiff having reserved the right to make a general objection to the introduction as testimony of the foregoing receipts and claims set up by the defendant against the rights of the plaintiff

92 in this suit, now puts in the objection that they are not such claims as can be an off-set or as can be used to invalidate the title of the plaintiff to the property which she derived by descent from her father, and that if she paid those claims it was voluntary and not by contract between her and the plaintiff.)

Cross-examination by Mr. NORRIS:

Q. Where were you living at the time you paid those taxes, the bills of which you filed here, and the accounts against Richard Vigel.

A. At Senator Caldwell's on 13th street. I paid some, but not all, there.

Q. What year did you live at Senator Caldwell's?

A. About 1870.

Q. How long have you been living in the house that you now occupy on "L" st.?

A. Always have lived there since it was built, and am living there now.

Q. Did you ever pay any rent or any board to your brother?

A. No, sir.

Redirect by S. S. HENKLE:

Q. You say you wer' living at Senator Caldwell's when you paid some of those bills, what do you mean by that?

A. I mean that I worked there and kept my room in the house on L street.

her
SUSAN + VIGEL.
mark.

Attest:
ROBT. J. MURRAY.

Subscribed and sworn to before me this 29th day of Apr., A. D. 1876.
ROB'T J. MURRAY,
Examiner in Chancery.

93 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Robert J. Murray, examiner in chancery, do hereby certify that in pursuance of notice given, the foregoing depositions were taken down and by me reduced to writing in the presence of and from the statement of the witnesses at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses and by them subscribed in my presence and the presence of counsel who were then and there attending, the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

ROB'T J. MURRAY,
Examiner in Chancery.

94 *Depositions taken for complainant.*

In the supreme court of the District of Columbia.

HOPP *vs.* VIGEL. } No. 4216. Eq. doc. 14.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses, begun and held on the 9th day of June, A. D. 1875, and continued from time to time by adjournment within noted, until the 12th day of June, A. D. 1876, when the within depositions were taken, I, Edward C. Ingersoll, an examiner in chancery, did cause to be personally present, at my of-

fice, No. 406 Louisiana ave., in the city of Washington, in said District' the within named *named* witnesses to testify in a certain cause now depending in the supreme court of the District of Columbia, wherein Hopp is complainant and Vigel is defendant.

I, Edward C. Ingersoll, examiner in chancery, do hereby certify that in pursuance of agreement of solicitors the within depositions were taken down and by me reduced to writing in the presence of and from
95 the statement of the witnesses at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses, and by them subscribed in my presence and in the presence of counsel who were then and there attending. The witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

EDWARD C. INGERSOLL,
Examiner in Chancery.

96 HOPP *vs.* VIGEL. } No. 4216. June 9th.

JUNE 12TH.—Met pursuant to adjournment and agreement of counsel, to take testimony in the cause for complainant.

Present, Mr. Norris for complainant, and S. S. Henkle for defendants.

Whereupon SUSAN HOPP, the complainant in this cause, first duly sworn, deposes as follows:

My father's name was Richard Vigel. He died 5 years ago last fall. I am the sole child of Richard Vigel. I had a husband, Henry Hopp, who is dead. He died a year ago last fall. When my father died he owned in this city the lot and improvements described in the bill only.

Int. State whether you ever made sale of that property or any portion of it to Mrs. Susan Vigel.

Ans. No, sir; I did not.

Int. Can you read or write, or could your husband?

Ans. I cannot, nor could my husband.

97 Int. State whether you ever received any money by loan or otherwise from Susan Vigel; and, if so, how much, and state all the circumstances.

Ans. I received a portion of $400.00 from her. I saw it but never had it in my hands. My aunt took it. This was at Mr. Marsh's office, on F st., in this city. Mr. Marsh told her that she was to hold the property until she, Susan Vigel, was paid. I don't recollect whether there was any time fixed for the payment of the money back. My husband and I got the money to redeem a place over in Virginia. We sold the property in Virginia, and I got about $700.00 and something more, $750.00, I think. The day after the property was sold Susan Vigel and I went to the bank together, and my aunt and myself paid the $400.00 on the other piece of property, this was paid out of my money that I got from Virginia. There was nothing said at the time of the payment of the $400.00 note, except that she, Susan Vigel, said she was to get a release.

Int. State now whether you received any other money from Susan Vigel except the $400.00.

Ans. I received $15.00 and I borrowed some other sums, but borrowed nothing on this property.

98 Int. State whether you ever made a sale of the property to her either for cash or on credit.

Ans. No, sir; I have not.

Int. Who occupies that property and has occupied it for some time past?

Ans. Mrs. Johnson, Mrs. Vigel, and Mr. Bell, and Miss Hawkins and another family who' name I don't know. I have 4 children, 13, 11, 3, & 1 years old. I do not occupy any portion of the house.

Int. When did you first learn that Mrs. Susan Vigel claimed to own this property?

Ans. This spring a year ago.

Int. Did you consult counsel to ascertain what her claim was founded on; and, if so, who was he?

Ans. I did consult Mr. Norris on my behalf.

Int. Who gave you information that there was a deed upon record conveying that property from you and your husband to Susan Vigel?

Ans. Mr. Norris.

Int. Was that the first you knew of it?

Ans. It was.

Cross-examined by Gen'l HENKLE:

99 My father died 5 years ago last fall. He lived right across the street from the property at the time of his death. He lived in the property in question about 27 years ago. When he married the second time he moved out of it. My aunt Susan Vigel lived in it all this time. She never lived anywhere else since the house was built. The house was built when I was a very small child, and my father and Mrs. Vigel lived there as long ago as I recollect. She had a room there, but I don't know that she kept house for my father for she was in service. I heard my father paid for the house, but I don't know.

Int. Didn't you hear that your father and Mrs. Vigel built it together?

Ans. I did not, except from her. I did hear so, from her. I couldn't say when I first heard her say so; it was since my father's death.

Int. How long after your father's death was it?

Ans. I couldn't tell. The reason she told me that she and him built it together was because she did not give me the rent as she promised to do, and I applied to somebody else to get it. Then she said

100 that she wouldn't give up, that she and my father had built the house together. She told me I would have to go before the magistrate before she would give up. I sent George Parker to see her, and she came to me. While my father lived he collected the rents of that house. My aunt did not pay rent in that house ever at all. I am sure of that. My father told me there was a home for Susan Vigel there while she remained single. I was quite small when he first told me that, but he said so several times, and after I was grown. My father, when he died, had a horse and wagon, and the furniture in the house; the horse died, one portion of the furniture is in the house yet, another part I have got. I sold the wagon. Mrs. Vigel carried a portion of the furniture to the house; I took the horse and wagon. My husband used the horse. I don't know whether the horse starved to death or not. My father owed some small bills when he died; my aunt, Mrs. Vigel, paid these debts out of the rent of the house. I don't know what the house rents for now.

101 Int. Did not you and your aunt, Susan Vigel, make an agreement after your father's death that you was to take the horse and wagon and the household goods and was to have the Virginia property, and your aunt was to pay your father's debts and have the property where she lived?

Ans. No, sir; I did not.

Int. Wasn't there talk of that kind between you?

Ans. She was talking with my husband, and saying that as he had the horse he was to make what he could to pay the debts, and she would draw the rents of the house to pay the debts also. This was to pay the burial expenses.

Int. Why was she to pay them?

Ans. I don't consider she did pay them, but that the house paid them.

Int. How did you happen to go to Mr. Marsh about that money?

Ans. We, that is I, had a debt to pay on a piece of property in Virginia, and she, Susan Vigel, told me she knew a gentleman who would let me have the money provided my husband and I would sign for the $400.00, and we all went together to Mr. Marsh's. Mr. Marsh
102 asked me and my husband if we were willing to get this amount of money. I told him yes. Then Mr. Marsh asked my aunt if my father owed her anything; she said yes, and he then asked her how much it was; she said she didn't know; and he asked her if she had anything to show for it, and she said no, and he told her this paper would give her "holt" until she was paid. Then he said to her say "a thousand," but she didn't say anything, and he told her she couldn't hold the property by the word of say so. Then told her that with that paper she had she could hold it until she was paid. She made no claim to the property in my presence on this occasion.

Int. Didn't you and your husband tell Mr. Marsh, or was it not talked over between you and your husband and Mrs. Vigel, that your aunt owned one-half of the property, and that she had agreed to let you take the horse and wagon and the household property, and she was to pay your father's debts, and you were to convey to her your interest in this property?

103 (Objected to as being in contravention of the record admitted to be true, in which this property in question is conveyed absolutely to her father.)

Ans. No, sir; nothing of that kind. I only said I wanted the $400.00 to redeem the Virginia property. He asked me the question, and I answered it.

Int. How did you come to make a deed of this property to your aunt at this time?

Ans. I didn't know that I did; I never heard that I did until lately.

Int. Did you not know at that time whey you were before Esquire Marsh that your aunt claimed to own one-half of the property?

Ans. I did not.

Int. Didn't she tell you so at the time you sent Parker to her?

Ans. Yes, sir; after that and long after the meeting before Esquire Marsh. My aunt never claimed to own one-half of the property until this spring a year ago, not to my knowledge. She then came to me and said: "Susan, what did you send Parker to me for?" And I told her I sent him for the rent, and she said the people were not pay-
104 ing her; and I said I would employ Parker. Then she said she wouldn't give up, that she had lent my father money, and that they built the house and got the place between them; she said she

wouldn't give up until she was paid. This was the first time I ever heard of her claim. About this time, that is the time of the meeting before Esquire Marsh, I made a deed of trust upon another piece of property in this city.

her
SUSAN + HOPP.
mark.

105 *Decree.*

In the supreme court of the District of Columbia, holding an equity court.

SUSAN HOPP
vs. } No. 4216. Eq. Doc. 14.
SUSAN VIGEL ET AL.

This cause coming on regularly to be heard, upon the bill of complaint, the answers of the defendants, the depositions and other papers read in the cause, was argued by the solicitors of the parties respectively; upon consideration whereof it is adjudged, ordered and decreed on this 7th day of December, 1876, that the deed in fee from Henry Hopp and the said Susan Hopp, of the 12th day of August, 1872, and the deed of trust of the same date of Susan Vigel to John H. Holden of the same date, and the deed of release of the 22nd day of March, 1872, from said Holden to Susan Vigel, be and each of them be and they are hereby annulled, set aside, and rendered void; and it is further ordered that the cause be referred to the auditor to ascertain and
106 state the amount of the debts of the intestate which were paid by the defendant Susan Vigel, and report the same to this court for further proceeding.

By the court. A. W.

107 *Appeal.*

HOPP
vs. } 4216. Eq. Doc. 14.
VIGEL.

Please enter an appeal in this case.

S. S. HENKLE,
Sol'r for Def't.

Appeal entered.
By the clerk.

1 *Decree gen. term.*

In the supreme court of the District of Columbia, in general term.

SUSAN HOPP
vs. } No. 4216. Eq. Doc. 14.
SUSAN VIGEL.

This cause came on to be heard, at the January term of this court, upon the record from the special term in equity, and was argued by counsel; upon consideration whereof it is adjudged, ordered and de-

creed on this 8th day of June, A. D. 1878, that the decree of the special term appealed from be and the same is ratified and affirmed, and the defendant gives notice of appeal, and the bond is fixed at $500.00.

By order of the court.

D. K. CARTTER,
Ch'f Justice.

109 In the supreme court of the District of Columbia, the 30' day of July, 1878.

SUSAN HOPP, COMPLAINANT,
vs.
SUSAN VIGEL ET AL., DEFENDANTS. } No. 4216. Eq. Doc. 14.

Know all men by these presents that we, Susan Vigel and Saul S. Henkle, are bound unto the above named Susan Hopp, complainant, in the sum of five hundred dollars, to be paid to the said complainant, her executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 30th day of July, 1878.

Whereas the above named defendant has prosecuted her appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia of June 8th, 1878:

Now, therefore, the condition of this obligation is, that if the above named defendant, Susan Vigel, shall prosecute her said appeal to effect, and answer all damages and costs if 'he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

her
SUSAN + VIGEL.
mark
SAUL S. HENKLE.

Sealed and delivered in presence of—
As to Susan Vigel:
ELIZA F. WILSON.
Approved.

HUMPHREYS,
Justice.

110 *Authentication of record.—Clerk's certificate.*

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 26' day of August, 1878.

[SEAL.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the aforegoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 26' day of Aug., 1878.

[SEAL.] D. K. CARTTER,
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 26' day of August, 1878.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 147. Susan Vigel, appellant, vs. Susan Hopp. District of Columbia sup. court. Filed 27th December, 1878.

Supreme Court of the United States.

No. 147.

SUSAN VIGEL, Appellant,

vs.

SUSAN HOPP, Apppellee.

Brief of S. S. Henkle for Appellant.

Supreme Court of the United States.

No. 147.

SUSAN VIGEL, Appellant,

vs.

SUSAN HOPP, Apppellee.

Brief of S. S. Henkle for Appellant.

Statement of the Case.

The parties are both illiterate colored women living in the city of Washington, neither of whom can read or write. Susan Hopp is the daughter of Richard Vigel who was the brother of appellant. Richard died in Washington, where he had lived for many years, in 1869 intestate, leaving the appellee his sole heir at law. He died, seized in fee of the lot of ground described in the Bill, on L. St., in Washington City, upon which is a frame house with six rooms. On the 12th day of August, 1870,

Susan Hopp, with her husband, Henry Hopp, who was then living, but subsequently died in 1873, conveyed said lot by deed in the usual form, in fee to Susan Vigel. The deed was acknowledged before R. H. Marsh, a justice of the peace. Susan Vigel, who lived in one room of the house at the time of her brother's death, took possession of the whole house after his death, and remained in the undisturbed possession until the filing of the Bill in this case in March, 1875. The substantial charge of the Bill is, that Hopp being in want of money to discharge a lien upon some land in Virginia which she had inherited from her father, spoke to her aunt Vigel about getting a loan. Vigel told her they could get it from Esq. Marsh; that she, her husband and Vigel went to Marsh's office; that she and her husband were illiterate, and could neither read nor write; that they were guided entirely in the execution of the papers by Vigel and Marsh; that she got $400, and paid off the indebtedness in her Virginia land; that she sold the Virginia land and paid off the note, and some time after applied to her aunt for a release of what she supposed was a deed of trust, and was shocked to find that her aunt claimed that she had bought the lot from her, and paid her $1,000 for it.

She charges that she had no idea of selling the property, and that the matter of a sale was never mentioned to her; that the deed is a fraud, &c., and prays to have it set aside, &c. The Bill calls for answers under oath.

The defendant Vigel answers. After preliminary admissions, she says: The business transactions between her and appellee are not truly stated in the Bill. She says the facts are, that in 1844 she was unmarried, and her

brother was a widower with one child (the plaintiff); that in that year her brother bought from Samuel D. King the lot described in the Bill for $90. Her brother paying one half and she one half. She was at that time a cook and he a hod carrier; and that she was earning more money than he was; that directly after, they built a house on the lot, which was paid for out of their joint earnings; she thinks she paid more than he did, but it was understood between them that they each owned one half of the property; that she and her brother lived in the house together for several years, until he got married, and moved into a house owned by his wife about 1849; after her brother left she took one room and her brother rented out the rest of the house, and received the rents for about twenty years until his death; that she always supposed the title was in them both, until since her brother's death, when she found that it was in him alone; but that when in life he always recognized and treated her as having an equal interest with him in the property.

After her brother's death the plaintiff proposed to her to take plaintiff's interest in the property and pay her brother's debts and let plaintiff have the personal property, to which she assented, and she accordingly paid the debts amounting to about $500, which together with her just claim for a share of the rents received by her brother for twenty years, amounted to much more than plaintiff's interest in the property was worth; that it became necessary for the plaintiff to have some money to protect her interest in the Virginia land referred to in the Bill, from sacrifice or loss, and she applied to appellant to aid her in procuring the money; they accord-

ingly went to the office of the defendant Marsh, who was a justice of the peace, and stated to him the nature of their agreement respecting the property, and their desire to raise money for the purpose aforesaid and for other purposes, and he advised the complainant to make a deed, and then this defendant to make a note and a deed of trust for $400, which was accordingly done, and the note was negotiated by Marsh at the Freedman's Bank; but the note was no part of the consideration for the lot, but was given to raise money as an accommodation for the complainant, and was rightfully paid out of complainant's money. She denies that she in any way, either by herself or in connection with Marsh, or any one else committed, or attempted to commit, a fraud upon the complainant, and the transaction between them is truthfully stated in her answer, and was in her opinion just and advantageous to the complainant, as her interest in the property would have been taken by the creditors of her father if defendant had not paid them, and but for her assistance complainant would have forfeited and lost her interest in the Virginia land. Every statement or allegation of the complainant's bill inconsistent with the facts stated in her answer, she says, are untrue. The answer is sworn to.

Marsh answers, that prior to the 12th of August, 1870, he has no knowledge of the transactions between plaintiff and defendant; that on that day they called at his office, he being a justice of the peace, and stated to him the nature of their business, and that they wanted to raise about $400. He understood from both of them that the defendant Vigel was the owner in equity of one half of the lot described in the Bill; that Vigel had

agreed to pay her brother's debts and let Hopp have the personal property, and Hopp was to convey her interest in the house and lot to Vigel. They brought with them the deed conveying the property to Richard Vigel. Vigel said she had discovered before her brother's death that the title was in him, and had wanted him to fix it so she could have her rights, and he said it would be all right, but died without fixing it. It was said by the parties that Richard had received the rents for many years, and in consideration of this and assuming to pay her brother's debts, and letting the daughter take the personal property, complainant was to give up her interest in the lot to her aunt. Respondent had nothing to do with the agreement between the parties, except to make the necessary papers to carry it into effect, as the agreement was made before the parties called on him.

It was the suggestion of the respondent to raise money by Susan Vigel making a note to complainant and giving a deed of trust upon the property, but it was understood it was an accommodation note for the benefit of the complainant, and was to be paid out of the proceeds of the Virginia land, when sold.

Respondent had no knowledge of any of the parties until they called upon him as aforesaid, and had no manner of interest in the transactions between them, and simply in good faith executed such papers as he understood to be necessary to carry out their agreements theretofore made, and if there was any fraud or undue advantage on the part of Vigel, he had no knowledge of it, nor did he hear or see anything which led him to suspect any such thing. On the contrary, from the con-

versation between the two women and the husband of the complainant in his office, he supposed the transaction to be fair and honest, and the complainant understood the whole matter at that time and expressed entire satisfaction with it. Respondent is still of the opinion that the arrangement was fair and equitable between the parties.

The complainant below testified in support of her bill on pp. 32 to 35 Rec., and by a mistake in making up the record the testimony of complainant in rebuttal is placed first in pp. 12 to 15.

No other witness testifies in behalf of the complainant as to any disputed matter in the case. On p. 11 is an agreement that John A. Gray would testify as to complainant receiving money from the sale of her Virginia land, but this is not a controverted fact, and is entirely immaterial to the issue.

The defendant Susan Vigel's testimony will be found on pp. 20 to 25, and 29 to 31 Rec. Her testimony is simply an amplification of the answer. She says that she paid her brother's debts amounting to $500. She also gives an imperfect statement of rents received by her brother for twenty years, from which any fair estimate would make her share of rents received and unaccounted for by her brother amount to more than his share of the property was worth. That Marsh read over and explained the papers to the complainant and her husband, and they were satisfied with them.

Marsh testifies (pp. 17 to 20 and pp. 26 to 27) to the circumstances and understanding between the parties at the time of making the deed. That the husband of plain'ff

was with them and joined in the deeds That the papers were made by their direction and embodied their understanding and agreement. That they were fully explained to the parties before signing, and that they were fully satisfied with them. On p. 19, Marsh says that he fully explained to the plaintiff the instrument conveying the L St. lot, and that the papers prepared by him and executed by them embodied the agreement and contract between the parties. That he had no interest in the matter, and that he did not conspire or confederate with Vigel to cheat the plaintiff.

Gabriel Cloakey testifies on pp. 16 and 17, that he was employed as coachman for Mr. Cochran, and that Vigel was cook; that she frequently sent money by him to her brother Richard to pay on the property. Richard told him he and Susan were trying to get a home for themselves.

Elizabeth Neil, on pp. 27 to 29, testifies that she knew Richard and Susan before they bought the lot. The lot adjoined witness' lot; she heard frequent conversations between Richard and her mother at the time they were paying for the lot and building the house. He told witness (on p. 27) that he and his sister were buying the lot and they intended to put up a house, and afterwards they did put up a house (on p. 28). He said that Susan was making every other payment on the house and lot. He said if he died it belonged to his sister, and if she died it belonged to him. He said he was going to buy a house and lot and give it to his daughter Susan, so she would not interfere with her aunt.

Witness (p. 29) says she recollects these facts as distinctly as if it were yesterday.

This, I believe, is the substance of all the testimony material to the issue in the case.

Upon hearing, in the special term, the court decreed, "that the deed in fee from Henry Hopp and Susan Hopp, of the 12th day of August, 1852, and the deed of trust of the same date of Susan Vigel to John H. Holden, and the deed of release of the 22d day of March, 1872, from Holden to Susan Vigel, be, and each of them be, and they are, annulled, set aside and rendered void; and it is further ordered, that the cause be referred to the auditor to ascertain and state the amount of the debts of the estate, which were paid by the defendant, Susan Vigel, and report the same to this court for further proceeding." See p. 35, rec.

And upon appeal to the general term, said decree was affirmed. See p. 35–6, rec.

Assignment of Error.

The court below should have dismissed the bill instead of affirming the decree of the special term found on p. 35. rec.

The complainant has totally failed to sustain her bill by the evidence, even if a simple preponderance were sufficient, for the weight of evidence is clearly against her.

It is a well-established rule of courts of equity that where the defendant in his answer, in express terms negatives the allegations in the bill, the court will make no decree upon the testimony of a single witness unless it

be corroborated by circumstances which are, in themselves, equivalent to the testimony of another witness.

Story's Eq., sec. 1528; 1 Greenleaf Ev., sec. 260; Brown vs. Balkey, 1 McCarter, 294; Pember vs. Mathews, 1 Bro, Chy., 52; Clark's Ex'r vs. Van Reinsdyke, 9 Cr. 160; Green vs. Vardiman, 2 Blackf., 328; Hughes vs. Blake. 6 Wheat., 453; Tobey vs. Leonard, 2 Wall., 423.

The circumstances do not corroborate the complainant's testimony, but, on the contrary, are against it. But if they did, they must be sufficient to overcome the positive testimony of the witnesses who have testified for the defendant.

Where it is sought to set aside an executed contract on the ground of *fraud*, the fraud must be clearly and distinctly proved as alleged in the bill.

"If actual fraud is alleged relief cannot be had on the bill by proving constructive fraud."

"If the bill alleges a case of fraud and the title to relief rests upon that fraud only, the bill will be dismissed if the fraud as alleged is not proved."

Kerr on Mistake & Fraud, pp. 382-3, and the cases cited;

Daniel's Chy. Pr., vol. 1, p. 328, and cases cited.

And see Selden vs. Myers et al., 20 How., 506, which is much like this case, but much stronger, for the complainant; and the case was supported by evidence but this court dismissed the bill.

Inadequacy of consideration was one of the grounds urged in argument below for setting aside the deed.

The case made in the bill is fraud in procuring a deed from complainant which she did not know she was making, and as we have seen she must recover upon the case set out in the bill or not at all. But if the evidence is to be credited the defendant below was the equitable owner of one-half the property in her own right, and had a just claim against her brother for rents received by him for more than his share of the property was worth. Besides Vigel paid $500 of her brother's debts upon the faith of this contract. So that the consideration was full and ample.

But inadequacy of consideration is never ground for setting aside an executed contract, unless it be so enormously great as to be conclusive evidence of fraud.

Fry on Specific Performance, p. 193, sec. 279, and the numerous cases cited;

Eyre vs. Potter et al., 15 How., 42.

The case was also argued in the court below as though Vigel was the complainant, and was seeking to establish a resulting trust in her favor in the property on account of having paid half the money to purchase it; and the learned counsel elaborately discussed the amount and character of the evidence necessary to establish a resulting trust.

Says the court in Seymour vs. Delany, 3 Cow., at 539: "It may be proper to premise that there is a distinction between a court of chancery refusing to decree the specific performance of a contract and setting it aside. It is also well settled that a court of equity will not disturb

an agreement *that has been executed*, although they would not have decreed a specific performance."

Mattock vs. Butler, 10 Ves. at 306;
Willan vs. Willan, 16 Ves. at 83;
Jackson vs. Ashton, 11 Pet., 229;
Beck vs. Simmons & Kornigay, 7 Ala., at 75;
Osgood vs. Francklin, 2 John. Chy., at 22.

There is no possible view in which the decree in this case can be sustained.

SUMMARY.

The bill is to set aside an executed contract on the ground of *fraud*.

In order to recover, the specific fraud alleged in the bill must be clearly and distinctly proved.

In this case the only witness who testifies in support of the bill is the plaintiff herself, and against her is the evidence of the defendant, Vigel, and the disinterested witness, Marsh. So that the preponderance of the evidence with the defendant below.

Where the charges in the bill are positively denied in the answer, no decree can be had on the testimony of a single witness, unless corroborated by circumstances equivalent to another witness.

Here the circumstances corroborate the appellant—*i. e.*, the appellant was the owner in equity of one-half of the property. After the making of the deed the appellant paid the debts of Richard Vigel, and the appellee took

and used the personalty which was first liable for the debts in the course of administration. The appellant remained in the undisturbed possession of the property for five years after the making of the deed until the filing of bill.

A court of equity will never set aside an executed contract for inadequacy of consideration unless it be so enormous as to be conclusive evidence of fraud.

It is well settled that a court of equity will not disturb an *executed agreement*, although they would not have decreed a specific performance.

S. S. HENKLE,
For Appellant.

14-442
Opinion C. J.

Filed Dec 22 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 188.

ROBERT L. BRADLEY'S ADMINISTRATOR, APPELANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 3, 1879.

SUPREME COURT OF THE UNITED STATES.

No 188.

ROBERT L. BRADLEY'S ADMINISTRATOR, APPELANT,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I.—*Petition.—Filed April* 27, 1872.—*J. R.*

In the United States Court of Claims.

PETER BRADLEY, ADMINISTRATOR OF THE succession of Capt. Robt. L. Bradley, deceased. *vs.* THE UNITED STATES.	No. 6442.

To the honorable the judges of the Court of Claims:

The petition of Peter Bradley, administrator of the succession of Robert L. Bradley, deceased, respectfully represents:

1. That petitioner is, and the late Robert L. Bradley was, a citizen of the United States, and at all times bore true allegiance to the Government of the United States, and in no way, voluntarily or otherwise, aided, abetted, or gave encouragement to rebellion against said government.

2. That early in 1869 the late Robert L. Bradley gave to the proper customs officers at New Orleans, La., the information which led to the recovery by the United States from August Couturiè & Co., of New Orleans, La., of $119,628.94, in coin, by way of forfeiture for violation of the revenue laws of the United States by said Couturiè & Co., which said sum has been paid into the Treasury.

3. That said Robert L. Bradley was the "officer making the seizure" of the fraudulently imported goods.

2 4. That one-quarter of said sum so received, viz, $29,907.22, in coin, is due to the succession of said Robert L. Bradley, deceased, represented by your petitioner, from the United States, being the informer's or seizing officer's share, under and by virtue of the first section of the act of March 2, 1867, ch. 188, 14 Stat., 546, of said forfeiture, and that demand has been made upon the Secretary of the Treasury, by your petitioner, for the said sum, without success.

Wherefore your petitioner prays judgment of this honorable court for the said sum of $29,907.22, in coin, against the United States.

PETER BRADLEY,
Administrator of the Succession of Robert L. Bradley,
By CHAS. E. HOVEY,
Attorney.

WASHINGTON, D. C.:

Chas. E. Hovey, attorney for petitioner, being duly sworn, says, upon information and belief, that no assignment or transfer of the foregoing claim, or any part thereof, or interest therein, has been made; that petitioner is justly entitled to the amount thereof, after allowing all just credits and offsets; and that he believes the facts to be true as stated in the foregoing petition.

CHAS. E. HOVEY.

Sworn to and subscribed, this 27th day of April, 1872, before me.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Claimant's address, New Orleans, La.
Solicitor's address, Washington, D. C.

3 II.—*Traverse.—Filed June* 28, 1872.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United states are indebted to the said claimant in the sum of twenty-nine thousand nine hundred and seven dollars and twenty-two cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

WILLIAM McMICHAEL,
Assistant Attorney-General.

4 III.—*Motion to suppress the depositions of Charles Dillingham and Lionel A. Sheldon, and the ruling of the court thereon.*

And now, on the 14th day of May, 1877, comes the claimant, by his solicitor, and moves the court to suppress the depositions of Charles Dillingham, the naval officer, and Lionel A. Sheldon, a surety on his bond of indemnity, given to the Secretary of the Treasury, on the ground that these witnesses are interested in the event of this suit, and that their depositions were not taken in the manner pointed out in the statutes. (Revised Statutes, sections 1079 and 1080.)

CHAS. E. HOVEY,
Att'y for Claimant.

Filed May 15, 1877.

Upon the foregoing motion the court made the following ruling, to wit:

It appearing that the above-named deponents are not claim-
5 ants in this action, nor persons from or through whom the claimant derives his title, claim, or right against the United States, nor persons interested in such title, claim, or right, and are not offered as witnesses in supporting the same, but are called by the defendants, and their depositions are offered to defeat the claim, the foregoing motion is overruled.

By the court.

6 IV.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. August Couturiè & Co. were importers and commission merchants in New Orleans, La., and during the spring of 1869 and up to June of that year imported into the port of New Orleans several cargoes of sugar, by different vessels, including among them the Dexter Washburn.

II. The sugars on arrival were entered, examined, appraised, weighed, and liquidated, and the duties to be paid on each box or

package were ascertained and fixed by the proper revenue officers, and stored in bonded warehouses, except the cargo by the Dexter Washburn, the disposition of which is not proved.

III. In the month of April, 1869, James F. Casey was appointed collector of the port; James Longstreet, surveyor; and Charles Dillingham, naval officer; and P. J. Herwig, special deputy collector, all entering upon their duties during that month.

IV. About the time of the appointment of said officers, rumors were current in commercial circles, on the street, and in the newspapers of New Orleans that frauds had been and were committed in the importation and entry of sugar for payment of duties at the custom-house, but it is not proved that any person there knew of any facts establishing evidence of such frauds.

V. Collector Casey wrote to the Treasury Department on the subject, and a special agent was sent to New Orleans to investigate the matter. He also directed the preparation, from the books of his office, of an abstract of all sugars shipped to that port, and took other measures to detect the frauds. In May, 1869, one Beares informed Collector Casey, from information received from claimant, that frauds were committed in the custom-house on weights and classification of sugars, but specified no facts, and it does not appear that they knew of any. Collector Casey, on the 5th of June, employed said Beares and the claimant "to ferret out these frauds." The next day said Beares and said Bradley visited the schooner Dexter Washburn. Mr. Bradley took samples and Mr. Beares took cognizance of the weights. The latter reported to Mr. Casey, who referred him to Mr. Herwig. They then waited until the 15th or 16th of June, until the report of the schooner was handed in to the custom-house, and then made their report to Mr. Herwig that there was committed fraud in the weights and classification of sugar on that schooner.

VI. After Naval Officer Dillingham entered upon his duties he began to make himself familiar with the workings of his office, and examined the different books kept there. Finding that Couturiè & Co. were large importers of sugar, and that their sugars were all entered of low grades and weight, his suspicion was excited. He then went to an acquaintance of his, one Perkins, and obtained from him a sample and the weights of sugars purchased the day previously of said Couturiè & Co. By comparison he found the sample to be of grade No. 20, Dutch standard, whereas the sugars withdrawn by Couturiè & Co. the day before had been entered at the custom-house and withdrawn and duties paid thereon as not above No. 12, Dutch standard, the latter paying two cents a pound in coin less rate of duties than the former. He also found a difference in weight, the sugars having been sold at 420 pounds per box and withdrawn from the custom-house at 383 pounds per box. On the same day, about June 12, he gave orders not to allow Couturiè & Co. to withdraw any more sugars; and none were thereafter withdrawn by them, although they made the attempt.

VII. Dillingham thereupon consulted with the United States district attorney, and with Mr. Sheldon, member of Congress, and it was decided to take samples of all sugars in the bonded warehouses. Having a vacancy in the clerkships, he told Sheldon that he was going to appoint a man whom he could send out to make the examination, and Sheldon recommended the claimant, and shortly afterwards brought him to the office and introduced him to Dillingham. On the 17th of June Dillingham appointed the claimant as clerk in his office, and the first duty assigned to him was in getting samples of sugars in bond

from the warehouses. The claimant was employed to act under the direction of the naval officer in investigating and seizing the sugars, and in "working up" the sugar cases.

7 Between the 19th and 25th of June claimant proceeded to the bonded warehouses, examined and took samples of Couturiè & Co.'s sugars, carried the same to the naval office, and delivered them to Mr. Dillingham.

VIII. On the 29th of July, 1869, the sugars (in the warehouses, under the charge of a government superintendent and storekeeper) belonging to said Couturiè & Co. were seized by an order from the superintendent to the storekeeper, of which the following is a copy:

"U. S. CUSTOM-HOUSE, W. H. SUP'D'T'S OFFICE,
"*New Orleans, July* 29, 1869.

"SIR: In compliance with instructions received under date of June 29th, 1869, I have this day seized the following-described merchandise, stored in U. S. bonded warehouse No. 4, class 3, imported by Messrs. Aug. Couturiè & Co.:

M'ks.	Nos.	Vessel.	Description of m'd'se.	
P. & A	1-30	M. E. Femerick....	Thirty hhds. sugar.	
2				
"	1-257	" ...	Two hundred and fifty-seven hhds. sugar.	
"	1-33	"	Thirty-three tierces	do.
C.	1-1300	R. W. Godfrey...	Thirteen hundred boxes	do.
C.	.....	Andromeda	One thousand boxes	do.
"	.....	do.	Eight hundred and fifty-five	do.
P. & A	1-209	E. H. Kennedy....	Two hundred and nine hhds.	do.
P. A. & C..	1-94	Jos. Long.....	Ninety-four hhds.	do.
P. & A	§210-66	Alice Starritt.....	Sixty-seven "	do.
P. A. & C..	1-18	Jos. Long.....	Eighteen hhds.	do.
C. & C.....	1-115	Alice Starritt.....	One hundred and fifteen hhds.	do.
C. S.....	1-72	do.	Seventy-two hhds.	do.

"Respectfully,

"J. L. HERWIG, *W. H. Sup'd't.*

"To JAMES WILDER, *S. K. No.* 4, *Class* 3."

There were present at this time Mr. Herwig, the deputy collector, Mr. Dillingham, the naval officer, the claimant, and the superintendent and storekeeper of the warehouses. No direct acts of taking possession of said sugars by anybody present are proved, and no acts of seizure except what appear from said notice. The sugars were in possession of the warehouse officers until they were subsequently removed to the custom-house building.

IX. Said sugars so seized were libeled in the United States district court in Louisiana for forfeiture on account of violation of the revenue laws, condemned, sold, and the net proceeds, after the deduction of expenses and legal charges, were paid into the Treasury, and distributed under the direction of the Secretary of the Treasury, one-half to the United States, and the same was covered into the Treasury, and one-fourth was equally divided between the collector, surveyor, and naval officer, and paid to them without controversy or objection.

X. Of the other one-fourth part, amounting to $29,073.99, the present claimant and others were before the Secretary of the Treasury as adverse claimants, each claiming the whole as informer or seizing-officer, and the collector, surveyor, and naval officer also claimed the same on the ground that there was no informer or seizing-officer.

On the 9th of May, 1872, the Secretary of the Treasury decided that there was no informer or seizing-officer, and directed the distribution of said one-quarter to said collector, surveyor, and naval officer, which was accordingly done in equal parts to each.

XI. At the time said money so ordered to be distributed as set forth in the next preceding finding was paid over to said officers, the Secretary of the Treasury required of each of them, as a condition precedent thereto, a bond of indemnity in the following form:

"Know all men by these presents that we, , of the city of New Orleans, in the State of Louisiana, as principal, and and , both of the city of New Orleans, Louisiana, as sureties, are held and firmly bound unto the United States of America in the just and full sum of twelve thousand dollars, money of the United States, to which payment well and truly to be made we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this ninth day of May, in the year of our Lord one thousand eight hundred and seventy-two.

"The condition of this obligation is such that whereas the said is awarded by the Secretary of the Treasury of the United States, on this ninth day of May, 1872, the sum of nine thousand six hundred and ninety-one dollars and thirty-three cents in satisfaction of his claim as [collector, surveyor, or naval officer,] in the absence of any informer or seizing-officer, to an additional share of the proceeds of forfeiture in the following-described cases, to wit: United States against Eight hundred and fifty-five Boxes of Sugar; United States against Four hundred and sixty Hogsheads and Forty-six Tierces of Sugar; United States against One thousand Boxes of Sugar; United States against Two hundred and fifty Hogsheads of Melado; United States against Two hundred and nine Hogsheads of Sugar; United States against One thousand three hundred Boxes of Sugar:

8 "Now, therefore, if the said shall, in case it shall be decided by the United States Court of Claims, or, if appeal is taken, by the Supreme Court of the United States, that any other person than the said is entitled to share as informer or as seizing-officer in the above-described cases, return to the Treasury of the United States, on demand, the money paid him under the above-stated award, then this obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue.

" . [SEAL.]
" . [SEAL.]
" . [SEAL.]

"Witness:
" ."

And each of said officers gave such bond, duly signed, sealed, executed, approved, and accepted by the Secretary of the Treasury, in accordance with said requirement.

XII. In the proceedings for forfeiture before the United States district court aforesaid no claimant appeared asking a decree of said court in his favor for an informer's share, or for the distribution of said net proceeds of the sale of the sugars so forfeited.

XIII. The first information of actual frauds committed in relation to said sugars so seized, forfeited, sold, and the proceeds thereof distributed was obtained by said Dillingham, about the 12th of June, 1869, through his own investigations, when he procured samples from Mr.

Perkins and made comparisons as set forth in the 6th finding, and tha was the information which first led to the seizure.

Additional findings allowed on request of claimant, as modified by the court.

XIV. Dillingham had no knowledge of the rumors of frauds prior to his entering upon his office, and Bradley, the claimant, had such knowledge of rumors. He was reputed a skillful detective, and had been engaged in an effort to trace out frauds in relation to the importation of sugars previously to his entering the customs service, and continued such efforts until proceedings were instituted for forfeiture. He was a material witness upon the trial for the forfeiture in the district court of Louisiana mentioned in the findings.

XV. In the proceedings for forfeiture before the United States district court at New Orleans no claimant appeared asking a decree of said court in his favor for an informer's share or for the distribution of the net proceeds of the sale of the sugar forfeited, before the fund was taken from the registry of the court and paid into the Treasury of the United States; but the claimant Bradley had spoken to counsel to aid him in prosecuting his claim while the cases were on trial, and he was killed before the cases were finally disposed of in the court.

XVI. The order of July 29, 1869, does not cover the sugars in Couturiè's private bonded warehouse, but only those in the public warehouse No. 4, class 3, in charge of Wilder, but said order covers all the sugars the seizure of which is proved.

CONCLUSION OF LAW.

The claimant is not entitled to recover, and judgment must be for the defendants for the reasons stated in the opinion of the court.

By the court.

9 *V.—Opinion of the court.*

RICHARDSON, J., delivered the opinion of the court:

In the year 1869 a mercantile firm in New Orleans imported a large quantity of sugars, which were seized for violation of the revenue laws on the part of the owners, and by proceedings in the district court of the United States for Louisiana were forfeited, sold, and, after deduction of the cost, expenses, and legal charges, the net proceeds were paid into the United States Treasury. No party appeared before said court as claimant to any share of the forfeiture, either as collector, surveyor, naval officer, informer, or seizing-officer.

The Secretary of the Treasury distributed one-half the amount to the United States, and the same was covered into the Treasury, and one-quarter to the collector, surveyor, and naval officer, in equal shares, without objection.

As to the other quarter a controversy arose. It was claimed by the present claimant, as informer or seizing-officer, by several other persons, each as informer, and also by the collector, surveyor, and naval officer, on the ground that there was no informer and no seizing-officer other than one of themselves.

On the 27th of April, 1872, the claimant commenced this action to recover said one-quarter share alleged therein to be due to him as informer or seizing-officer.

On the 9th of May, 1872, the Secretary of the Treasury decided that there was no informer and no seizing-officer other than the collector, surveyor, and naval officer, and, following the opinion of Attorney-General Stanbery (12 Opins. Att'ys-Gen., 291), ordered the money to be paid to those three officers in equal parts. But before paying the same the Secretary required of each of said officers a bond of indemnity, with sureties, obligating themselves to refund said money to the Treasury in the event of this case being decided in favor of the claimant by this court, or, on appeal, by the Supreme Court. The bonds were so given, approved, and accepted, and the money was thereupon paid in accordance with said order of distribution.

The United States set up two distinct defenses, one to the jurisdiction of the court, and the other to the claim on its merits. We will consider them in the order stated.

The district courts have, and always have had, jurisdiction of suits for the recovery of penalties and forfeitures incurred under any law of the United States. (Act of Sept. 24, 1789, ch. 19, § 9, 1 Stat. at Large, 76; Revised Statutes, § 563.)

By the act of March 2, 1799, section 89, the money recovered in such suits, after deducting all proper charges to be allowed by the court, was required to be received by the collector of customs, who was thereby required "to pay and distribute the same, without delay, according to law." (1 Statutes, 696.) Section 91 provided how the same should be divided among the officers, informers, and the United States.

Under this law it was held that while the money was within its control the court had jurisdiction to hear and to determine the claims and rights of all parties who demanded to share in the fund arising from forfeitures, and, when adjudicated, that the collector was bound to pay the same according to the decree of court. Judge Story, in 1832, said: "When a sentence of condemnation has been finally pronounced in a case of seizure, the court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds according to law. And it is a familiar practice to institute proceedings of this nature whenever a doubt occurs as to the rights of the parties who are entitled to share in the distribution." (McLane vs. U. S., 6 Peters, 404.)

And this opinion has ever since been adopted and followed by the district courts. (Wescott vs. Bradford, 4 Wash. C. C. R., 492; Ex parte Cahon, 2 Mason, 85; La Jeane Eugenie, 2 Mason, 409; Hooper vs. 51 Casks Brandy, 2 Ware, 371; U. S. vs. 50,000 Cigars, 1 Lowell, 22; U. S. vs. Morris, 10 Wheat., 290; Jones vs. Shore's Executors, 1 Wheat., 462; U. S. vs. George, 6 Blatch., 45.)

When there was no claimant to the proceeds after forfeiture, as informer or otherwise, before the court in the principal cause, and the money was paid to the collector, the jurisdiction of the district court
10 over the fund and the distribution of the same as incident to the original action terminated. But then arose, without express statute provision therefor, and solely on general principles of law, the right of claimants to bring their independent actions of assumpsit against the collector to recover the respective shares to which they might prove themselves entitled. The collector was regarded and treated as merely a ministerial officer, whose duty was to pay the money in his hands to the parties to whom it belonged, when there was no controversy or objection, or when claimants had established their rights by ordinary proceedings in the courts of law, without authority to finally determine the conflicting claims of adverse parties. And suits

at law were from time to time brought and maintained against collectors in such cases, and those officers retained the money in their hands, often to large amounts, to await the event of pending actions against them. (Brewster vs. Gelston, 1 Paine, 426; Sawyer vs. Steele, 3 Wash., 464.)

The act of March 2, 1867 chapter 168, (14 Statutes, 540; Revised Statutes, §3090), provides that after the deduction of charges and expenses, and in certain cases the duties, the residue of the proceeds of fines, penalties, and forfeitures incurred under the provisions of the laws relating to the customs "shall be paid into the Treasury of the United States, and distributed, under the direction of the Secretary of the Treasury," to the informer, seizing-officer, and other officers, and the United States, as therein specified. Judge Blatchford, in the district court of the southern district of New York, in the case of United States vs. George (6 Blatch., 33), reviews with great care the effect of this law, and holds:

1. That the money when received into the registry of the court is not payable directly into the Treasury of the United States, but must be paid to the collector of the port as before, and that the collector, after deducting duties and other charges, must pay the same into the Treasury.

2. That while the money remains in the registry the court has the same jurisdiction which it had previously to determine the rights of parties claiming the fund as informers, officers, and otherwise, and the court having made a decree determining these rights, the Secretary of the Treasury, when the money reaches him, is bound to distribute the same accordingly.

In his opinion in that case Judge Blatchford says: "The effect of the change made by the act of 1867, in regard to the channel of distribution, is merely to substitute the Treasury of the United States as a place of deposit for the money, when nothing is left to be done in regard to it but to distribute it, and to substitute the Secretary of the Treasury for the collector as a ministerial agent of distribution." And as to the jurisdiction of the district courts, he adds: "This jurisdiction being well established, there is nothing in the act of 1867 which takes it away, or which confers on the Secretary of the Treasury any more power to decide disputed claims to the fund than the collector had under the act of 1799. The judicial tribunal which has the custody of the fund is the proper forum to entertain and decide disputes as to shares in the fund, and to direct how it shall be distributed, and to what persons, under the act of 1867, under the direction of the Secretary of the Treasury as a ministerial officer."

If, then, the Secretary of the Treasury is by the act of 1867 merely substituted for the collector as a ministerial officer to distribute the funds, and the distribution is to be under his direction only as such ministerial officer, and if while the money is under its control the court in which the suit for forfeiture is pending may still determine, as under the law of 1799, the rights of parties thereto by a decree which the Secretary is bound to obey, it would seem to follow logically that after the money had passed beyond the control of the court parties claimant did not lose their right of action to have their respective shares and claims determined by a court of law, although they would be remitted to a different judicial forum by reason of the fact that the money had passed into the public Treasury, and the United States are liable to action only in this court.

The collector could no longer be sued, nor would an action lie against

the Secretary of the Treasury personally, because the money is not in his hands, but in the Treasury of the United States.

The statute allows to certain officers and informers fixed shares of the fund, not to be altered or controlled at the discretion of any one. It is only to be determined who, in fact and in law, are the parties, if any, who have those rights, and if the Secretary is only a ministerial officer, without power to settle conflicting claims, this class of cases would seem to be within the jurisdiction expressly given to this court to hear and determine cases wherein the United States, having money due or claimed to be due to parties by statute law or contract, refuse to pay the same.

The claims of such parties certainly seem to be founded on a law of Congress or on contract within the meaning of Revised Statutes, § 1059. It was solely upon the ground of implied contract that actions were maintained against collectors under the act of 1799.

11 The jurisdiction of this court can be drawn in question only on the ground that the Secretary of the Treasury is something more than a ministerial officer in this matter. There is quite as much reason why parties claimant to such funds should have the right to have their respective claims determined by a court of law, now that the money is to be distributed under the direction of the Secretary of the Treasury by the act of 1867, as there was when it was to be paid out by the collectors under the law of 1799, for the Secretary of the Treasury has no better facilities for hearing, trying, and determining disputed questions of fact, involving the examination and consideration in many cases, as in this, of hundreds of pages of manuscript documents, and evidence taken ex parte, and much less time to devote to that duty, than had the several collectors of customs; the Secretary having now all the cases and all the duties in that respect which were before distributed among the numerous collectors throughout the country.

The object of the law of 1867, requiring the transfer of money collected from fines, penalties, and forfeitures to be paid into the United States Treasury, was no doubt for the purpose of preventing a large accumulation of money in the hands of collectors of customs and to insure its more safe keeping. It is a well-known historical fact that such was the object of Congress, in 1839, in passing the provisions of the act of that year (act of March 3, 1869, § 2, 5 Statutes at Large, 348) requiring collectors to pay into the public Treasury all money received by them for unascertained duties, or for duties paid under protest, the retention of which to await the result of suits pending against them therefor had just previously led to great and notorious frauds and losses. (Carey vs. Curtis, 3 Howard, 413.) The Supreme Court decided that this act of 1839 took away the right of action against collectors by parties who had paid duties under protest (Carey vs. Curtis, above cited), and there being then no Court of Claims, and the United States not being liable to actions, parties were wholly without legal remedy in the courts of law. This result appears to have been accidental, and not intended by Congress, and as soon as that decision was rendered the right of action was restored. (5 Statutes, 727.)

So the act of 1867 was manifestly not passed for the purpose of depriving parties of all resort to the courts of law for the determination of their controverted claims to funds arising from forfeitures, nor for the purpose of conferring upon the Secretary of the Treasury the power to determine judicially or as a matter of discretion who, as officers or informers, are entitled to share in such funds. The language of the act is that the money shall be distributed "under his direction," not according to his discretion, nor upon his award or decision.

If, then, again, the Secretary of the Treasury is to be regarded as only a ministerial officer with respect to such funds, as was the collector of customs under the former act, the jurisdiction of this court would seem to be sustained by the principles which we have recognized in the cases of Horace Boughton and George W. Campbell et al, decided at this term. (12 C. C. R., .)

There is a special reason, in connection with the considerations which we have set forth, why this court might perhaps be justified in taking jurisdiction of this action. It will be seen that the Secretary of the Treasury exercised his power and distributed the money in question conditionally, making the payment depend upon the giving of bonds by the distributees to refund the same in case this court, or the Supreme Court on appeal, should decide that any other person is entitled to share as informer or seizing-officer.

The Secretary thus expressly submitted the matters now in controversy to the determination of this court, so far as it was within his power to do so. As to the claimant, the action of the Secretary was the same, practically, as though he had refused to pay the money to any one. Of course, the Secretary of the Treasury cannot confer jurisdiction where none is given by statute, but, if there be concurrent jurisdiction, the Secretary might decline to exercise his power, and might turn the parties over to this court for their legal remedy. Or if the jurisdiction of the court depends, in such cases, upon the Secretary himself not undertaking to determine conflicting rights, and his refusal to make distribution whenever a conflict arises, on the ground that he is a ministerial officer, with power to pay the money only when there are no controversies, or when all controversies have been judicially determined, as was the case with collectors when they made such distribution, then the action of the Secretary in this may be taken as a refusal to distribute the money in question.

But this question of jurisdiction was not argued by claimant's counsel, and therefore, as well as because we do not find it necessary to pass upon it while reviewing the statutes and decisions far enough to make it apparent that a solution of the question may not be free from difficulty, we express at this time no final opinion on the subject. And we do this especially because the question may arise in other cases, when we shall have the benefit of a thorough examination and full arguments on both sides, and can better form a correct opinion thereon.

12 We are satisfied that on the merits the claimant has no cause of action. He claims as an informer and as seizing-officer, and if he had proved himself to have been either he would be entitled to one-quarter part of the forfeiture according to the provisions of the act of March 3, 1867, chapter 138. (14 Statutes, 546.)

An informer, within the meaning of the statute, is one who gives the first information in consequence of which a seizure is made and forfeiture consummated. The communication of a vague rumor, commonly known in commercial circles and elsewhere, that a person has committed frauds against the revenue, without some information as to what frauds have been committed and some clue to their detection, does not constitute one an informer within the meaning of the statute. (13 Opins. of Att'ys-Gen., 239.)

The facts show conclusively, we think, that the claimant not only did not inform the government officers of the frauds upon which the forfeitures in this case were founded, but also that he had no actual knowledge of those frauds or any others committed by the same parties.

In May, through another party, he informed Mr. Collector Casey that

frauds were committed in the custom-house on the weights and classification of sugar. This was only repeating a rumor current, as the facts find, on the street, in commercial circles, and in the newspapers. In consequence of this information, such as is was, the collector, on the 5th of June, did employ the claimant and the other party referred to for the purpose of ferreting out the sugar frauds, and his immediate action shows that he had no real knowledge of any frauds committed. Instead of seeking to ferret out frauds already committed, he set himself about watching for future cases. He went on board the Dexter Washburn, then in port with a cargo of sugar on board, took the weights and obtained samples, and then waited until the owners had entered their sugar at the custom-house, when he presented his weights and samples to the collector for comparison.

If, by this comparison, frauds were thereupon detected, it was in consequence of his direct information obtained in part through his labor and services while in the employment and pay of the government as an officer detailed for the purpose of procuring this very information. That an officer of the customs service, as well as a private citizen, may be an informer, entitled to share in forfeitures, is no doubt true, but it is only when he obtains his knowledge "incidentally, and not in the direct prosecution or course of his duty or of any special retainer for that purpose." On this subject Judge Lowell, of the United States district court for Massachusetts, has well stated the rules applicable thereto. He says:

"It is not denied that some officers of the customs other than the collector himself and the surveyor and naval officer—all of whom share in all the forfeitures—may themselves be informers. This has been decided so far as inspectors are concerned, and perhaps is true of deputy collectors. (Hooper vs. Fifty-one Casks of Brandy, Davies, 370; Brewster vs. Gelston, 11 Johns., 390; Sawyer vs. Steele, 3 Wash. C. C., 464.) And as to officers of revenue-cutters, the act is explicit in their favor; but I am not aware that it has ever been said or thought that an officer, being charged with the special duty of searching a vessel, in pursuance of definite information given by another person, could become the informer by reason of the diligence, fidelity, and success with which he prosecuted the search and found what he was sent to seek. To allow this would be contrary to the general principles of law and to the interest of the revenue laws, which expect the collector and his subordinate officers to pursue the course indicated by the information with all the means and efforts that may be necessary." (United States vs. Fifty Thousand Cigars, 1 Lowell 22.)

And again the same learned judge says:

"In my view, the cases in which an officer may be an informer are where he incidentally, and not in the prosecution or course of his duty or of any special retainer for that purpose, makes a discovery, as if an inspector, put on board of a vessel merely to keep the cargo safely,
13 discovers smuggled goods concealed, or where an officer set to inquire into a particular charge discovers something entirely different and before unsuspected, or where he is told by some one as a friend, and not as an officer, of facts which his informant, not w shing to be known, refuses to bring forward himself, but tells him for he very purpose of enabling him to give information in his own name—in these cases an officer may be an informer. I do not at present think of any others. Mr. Hawley's case, which has given me more trouble than any other, must be governed by these considerations. In my judgment, his retainer as a revenue agent, under pay, to investigate these

frauds, makes his time the time of the government and his information the information of the government, and he cannot justly lay claim to any share of this reward." (United States vs. Barrels Distilled Spirits, 8 Inter. Rev. Record, 20.)

The information obtained by the present claimant as to the sugars on board the Dexter Washburn did not lead to the seizure and forfeiture in this case. The sugars the forfeiture of which he is now seeking to share in were another lot, stored in warehouses, and the frauds were ascertained from a different source.

Mr. Dillingham, the naval officer, by investigations instituted by himself alone, discovered the frauds in relation to the warehouse sugars which were subsequently seized, and afterward he took the claimant into his pay and service as a clerk for the government in his office, "to work up the cases" and to act under himself in further investigations. But this was not until the naval officer's investigations had proceeded so far that he had impounded the sugars and given directions to the official custodian thereof to allow none of them to be withdrawn, and none were thereafter removed by the owners, although they made an effort at such withdrawal. And the fact found is that the discovery made by the naval officer was the first information which led to the seizure.

Not being an informer, was the claimant, then, a seizing-officer in that sense which would entitle him under the statute to one-quarter part of the forfeiture?

This large share, equal to that given to the collector, surveyor, and naval officer together, was offered by the statute to the seizing-officers, no doubt, to compensate them for their vigilance and activity, and for the great labor, peril, and personal risk, and liability to which they might be subjected. When, however, as in this case, the articles to be seized were in warehouses, under the control and in the custody of revenue officers appointed to guard and retain them until authorized by the collector to permit their discharge, the only seizure required was a technical one, for the sole purpose of laying the foundation for legal proceedings for forfeiture, and that was done by a simple authoritative notice to the warehouse-keeper, in the presence of the goods, that the articles were seized, with directions to retain them.

It seems to have been the practice of the Treasury Department to hold that in such case there could be no seizing-officer within the meaning of the act of 1867. The Attorney-General, in 1869, expressed a different opinion on the abstract proposition, not having before him, however, a case in which it was necessary to determine under exactly what circumstances and by what acts an officer in such case became such seizing-officer entitled to share in the forfeitures. (13 Opins., 255.)

But the facts found in this case do not render it necessary to determine whether a clerk of the government in the naval office, who is sent to execute the order of his superior officer in the technical seizure of property in the custody of other revenue officers, for the purpose of laying the foundation for proceedings of forfeiture, either as the medium of the transmission of a written order to the custodian of the property or otherwise, would be a seizing-officer or not.

The present claimant did absolutely nothing in the matter of this seizure. It seems to have been made by an order from the collector to the superintendent of the warehouses where the property was stored, and by him transmitted in writing to the storekeeper having the immediate custody of the property, and nothing more was done. At the time the seizure took effect there were present the naval officer, deputy

collector, and superintendent and storekeeper of the warehouses, as well as the claimant, and he was only a witness to the proceedings.

Under these circumstances the claimant was not the seizing-officer, and, as we have before shown, he was not the informer.

His petition must therefore be dismissed on the merits.

14 VI.—*Request of claimant for additional findings of fact, filed after the findings of the court and the rulings thereon.*

The claimant, by his attorney, requests the finding of the following additional facts:

I. Charles Dillingham and L. A. Sheldon are material witnesses and interested in the result of this suit adverse to this claimant.

II. The testimony of these witnesses has been used in this suit, although the same was not taken pursuant to an order of this court, as provided in sect. 4, act of June 25, 1868, and sect. 8, act of March 3, 1863.

III. A large portion, at least, of the cargo of the Dexter Washburn was among the sugars seized.

(NOTE.—Dillingham speaks of but one withdrawal after the arrival of this vessel—that of June 11—which Sheldon says was from the Andromeda. The returns of this cargo were not made to the collector
15 until June 15th or 16th, after withdrawals had been stopped. The only lot of Couterie's sugars not seized were those sold to Perkins, and by him to the government.)

IV. Dillingham had no knowledge of the rumors of frauds prior to his entering upon his office. Bradley, the claimant, had such knowledge. He was reputed a skillful de'ctive, and had been engaged in the investigation of these frauds for some time previous to his entering the customs service, and continued such investigation until proceedings were instituted for forfeiture. He was a material witness upon the trial, and was treated on such trial by the attorneys for the defence as the informer.

V. The claimant Bradley was a captain in the police force at New Orleans, and while in that position commenced the investigation of these sugar frauds. He resigned his position in the police force, and took a position in the custom-house under Collector Casey, for the purpose of working up these cases. Said Bradley, the claimant,
16 had been engaged in collecting information as to these sugar frauds prior to the appointment of Casey and Dillingham.

VI. The first information of these frauds given to the officer in charge of the government warehouse where these sugars were chiefly stored was given by said Bradley.

VII. Collector Casey, the officer representing the government, stated at and about the time of the seizure of the sugars that the claimant Bradley was the informer.

VIII. Dillingham, at the time Couterie and Co. got into difficulty with the custom-house authorities respecting their sugars, stated to Couterie that the claimant Bradley was the chief originator and investigator of the investigation, and the cause of the trouble he was in at that time.

IX. The first information received by Couterie that anything was wrong with his sugar was from the claimant Bradley.

X. The actions and statements of the custom-house officials, at
17 the time of the discovery and development of the frauds, the seizure, trial, and forfeiture of the sugars, was of such a character as to show that the claimant Bradley was the informer.

XI. In May, 1869, one Beares informed Collector Casey, from information received from claimant Bradley, that frauds were committed in the custom-house in weights and classification of sugars, which was the precise fraud charged against the forfeited sugars.

XII. The claimant, R. L. Bradley, and Beares were the persons who, on the 6th day of June, 1869, visited the schooner Dexter Washburn, and obtained therefrom weights and samples of her cargo of sugars. The same specific fraud in the classification and weights of sugars was shown to have existed in that cargo. Beares, on behalf of both Bradley and himself, reported this to Mr. Casey, who referred them to Mr. Herwig. Subsequently, on or about the 15th of June, they made a written report of this fraud to Herwig.

18 XIII. In the proceedings for forfeiture before the U. S. district court at New Orleans, no claimant appeared asking a decree of said court in his favor for an informer's share, or for the distribution of the net proceeds of the sale of the sugars forfeited, before the fund was taken from the registry of the court and paid into the Treasury of the United States; but the claimant Bradley had spoken to counsel to aid him in prosecuting his claim while the cases were on trial, and he was killed before the cases were finally disposed of in court.

XIV. Claimant Bradley was such an officer of the customs as might lawfully make seizures.

XV. Claimant Bradley notified Mr. Wilder, the officer in charge of public warehouse No. 4, in which a large portion of the sugars were stored, at the close of his examination of these sugars, that he seized them for a violation of the revenue laws. Said Bradley, at the close of his examination of the sugars stored in Couteriè's private bonded
19 warehouse, seized them for a violation of the revenue laws.

XVI. These seizures were subsequently ratified and adopted by Collector Casey in his instructions of June 29, 1869, as referred to in Herwig's formal order of July 29, 1869.

XVII. The order of July 29, 1869, does not cover the sugars in Couteriè's private bonded warehouse, but only those in the public warehouse No. 4, class 3, in charge of Wilder.

XVIII. Claimant Bradley, through Beares, in the month of May, 1869, first gave to Collector Casey information of the exact frauds committed by Couteriè and Co. in the weights and undervaluation of their sugars, conclusive proof of which having been subsequently obtained in great measure by the efforts of said Bradley, the sugars were seized and forfeited.

CHAS. E. HOVEY,
Att'y for Claim't.

On the foregoing requests the court decides as follows:

20 The first and second are refused, as presenting matters which the court is not required to find as facts.

The third is refused, because not warranted by the evidence.

The fourth is refused, as not warranted by the evidence except as follows:

Dillingham had no knowledge of the rumors of frauds prior to his entering upon his office, and Bradley, the claimant, had such knowledge of rumors. He was reputed a skillful detective and had been engaged in the effort to trace out frauds in the importation of sugars previously to his entering the customs service, and continued such efforts until proceedings were instituted for forfeiture. He was a material witness upon the trial for the forfeiture in the district court of

Louisiana mentioned in the findings. The above will be added as the fourteenth finding.

The fifth is not allowed, because to the extent set forth not warranted by the evidence.

21 The sixth, seventh, eighth, ninth, and tenth are not allowed, because in part they do not present matters which are connected, by themselves or by other evidence, with the material facts in the case, and in part are matters of evidence which are not proper to be incorporated in the findings of facts, and, so far as material, have been considered in making up the findings.

The eleventh is not allowed, because as therein set forth not warranted by the evidence.

The twelfth is not allowed, because beyond the facts in relation to the matters therein contained as set forth in the findings already made, not warranted by the evidence.

The thirteenth is allowed, and will constitute the fifteenth finding.

The fourteenth is not allowed, because presenting no fact but a conclusion of law.

The fifteenth and sixteenth are not allowed, because not warranted by the evidence.

The seventeenth is allowed, with this addition: But said order covers all the sugars the seizure of which is proved. And, as so added to the same, will form the sixteenth finding.

The eighteenth is not allowed, because not warranted by the evidence.

By the court.

22 VII.—*Final judgment.*

ROBERT BRADLEY'S ADMINISTRATOR
vs.
THE UNITED STATES. } No. 6442.

At a Court of Claims held at the Capitol, in the city of Washington, on the 18th day of June, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

23 VIII.—*Application for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause, on the 18th day of June, 1877, in favor the defendants, the claimant, by his attorney, on the 29th day of August, 1877, makes application for and gives notice of an appeal to the Supreme Court of the United States.

CHARLES E. HOVEY,
Att'y for Claimant.

Filed August 29, 1877.

AT CHAMBERS, COURT OF CLAIMS.

Allowed.

C. D. DRAKE,
Chief Justice.

24 In the Court of Claims.

ROBERT L. BRADLEY'S ADMINISTRATOR *vs.* THE UNITED STATES.	No. 6442.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the request of claimant for additional findings of fact and the rulings thereon, of the opinion of the court, of the final judgment of the court, of the application of claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of December, A. D. 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 188. Robert L. Bradley's administrator, appellant, vs. The United States. Court of Claims. Filed 3 May, 1879.

Supreme Court of the United States.

Robert L. Bradley's Administrator,
APPELLANT,

vs.

The United States.

No. 188.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

WASHINGTON, D. C.
R. BERESFORD, PRINTER, 523 SEVENTH STREET.
1881.

Supreme Court of the United States.

ROBERT L. BRADLEY'S *Administrator, Appellant,*
vs.
THE UNITED STATES.
} *No.* 188.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

In 1869 a quantity of sugar was seized, forfeited and sold at New Orleans for violation of the customs revenue laws. Its proceeds, after deducting expenses, were paid into the United States Treasury for distribution according to law. One half went to the Government, and one quarter to the Collector, Naval Officer and Surveyor of the Port of New Orleans without objection. The other quarter was claimed by two parties as informers; by Bradly's administrator, as informer and seizing officer; and by the officers of said port, Messrs. Casey, Dillingham and Longstreet, on the ground that there was neither informer nor seizing officer other than themselves. All these parties demanded the fund from the Secretary of the Treasury, and the Secretary intimated an intention to direct its payment to the Collector, Naval Officer and Surveyor, whereupon the two informers and Bradley's administrator filed petitions in the Court of Claims. Thereafter the Secretary of the Treasury paid the fund to said officers, but took from each a bond, with sureties, to repay the same to the United States in case the Court held the informers, or either of them, entitled to it.

When the case of Bradley's administrator was pending in the Court below, defendants offered in evidence the depositions of Charles Dillingham, one of the officers to whom the Secretary had paid the fund, and Lionel A. Sheldon, one of his sureties. Claimant's attorney objected to the use of these depositions, and moved to suppress them, on the ground "that these witnesses are interested in the event of this suit, and that their depositions were not taken in the manner pointed out in the Statutes," that is, on the order of the Court at the instance of the attorney for the United States. But the Court overruled the motion. The correctness of that ruling is the special matter in issue on this appeal.

The question of jurisdiction was also presented by defendants' counsel in the Court below.

I. As to Jurisdiction.

The Court of Claims has, by statute, jurisdiction of "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States." (Rev. Stat., chap. 21, sec. 1059.)

The appellant founds his claim upon the act of March 2, 1867, which declares that the proceeds of fines, penalties and forfeitures, after the payment of proper expenses, "shall be paid into the Treasury of the United States, and distributed, under the direction of the Secretary of the Treasury, in the manner following, to wit: One-half to the United States; one-fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty, and, if there be no informer other than the Collector, naval officer, or surveyor, then to the officer making the seizure; and the remaining one-fourth to be equally divided between the Collector, naval officer and surveyor," &c. (Rev. Stat., chap. 168, sec. 3090.)

The appellant claims, as informer and seizing officer, under this law. The court below had power to hear and

determine his claim unless its jurisdiction was ousted by the provision vesting in the Secretary of the Treasury the "distribution" of the fund. It is argued: if the fund must be distributed "under the direction of the Secretary of the Treasury," he must necessarily determine to whom to distribute it; and this power or jurisdiction is exclusive. But the courts hold the other way.

The old law of 1799 provided that the Collector should "pay and distribute" the fund according to law; the new law of 1867 provides that the fund shall be "distributed under the direction of the Secretary of the Treasury," according to law.

And Judge Blatchford, in a careful review of the two statutes, says:

"The effect of the change made by the act of 1867, in regard to the channel of distribution, is merely to substitute the Treasury of the United States for the coffers of the Collector as a place of deposit for the money, when nothing is left to be done in regard to it but to distribute it, and to substitute the Secretary of the Treasury for the Collector as the ministerial agent of distribution. * * * * * *

"There is nothing in the act of 1867 which confers on the Secretary of the Treasury any more power to decide disputed claims to the fund than the Collector had under the act of 1879." (U. S. *vs.* George, 6 Blatch., 37.)

And under the act of 1879, it is well settled that the Collector had no judicial power whatever.

Mr. Justice Washington disposes of the claim to such power formerly set up for the Collector—the same which is now sought to be set up for the Secretary of the Treasury—in the following language:

"The main strength of the objection rests upon the peculiar expressions of the 89th section of the act of 1799, which authorizes the Collector to receive from the Court, or its officer, the fund recovered or collected after costs and charges are deducted, and enjoins upon *him* the duty of making distribution. This is considered by counsel as being imperative on the Court, and ousts its general jurisdiction to decree the distribution. I think there is no ground for this argument.

"The above section merely points out the officer who is to receive the money from the Court, and who is to distribute it when no dispute exists respecting the distribution." (Westcot *vs.* Bradford, 4 Wash., C. C., 492.)

The very able and exhaustive opinion of the Court below on the question of jurisdiction, is printed as part of the record. The United States *vs.* George, above referred to, is a leading case. I cite, also, McLane *vs.* U. S., 6 Peters, 404; Exparte Cahon, 2 Mason, 85; La Jeane Eugenie, 2 Mason, 409; Hooper *vs.* 51 Casks Brandy, 2 Ware, 371; U. S. *vs.* 50,000 Cigars, 1 Lowell, 22; U. S. *vs.* Morris, 10 Wheat., 290; Jones *vs.* Shore's Executors, 1 Wheat., 462; Lapham *vs.* Alney, 13 Allen (Mass.), 301. Shelton *vs.* the U. S. — Ct. Cls. —.

2. As to the "Ruling" Objected to. (Rec. P. 2.)

The Statutes forbidding the use of claimants as witnesses in support of their own claims, except by special order of the Court, as originally passed, read as follows:

"Sec. 4. That no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim or right, against the United States, or any person interested in any such title, claim or right, shall be a competent witness in the Court of Claims in supporting any such title, claim or right, and no testimony given by such plaintiff, claimant or person shall be used: *Provided*, That the United States shall, if they see cause, have the right to examine such plaintiff, claimant or person as a witness under the regulations and with the privileges provided in section eight of the act passed March third, eighteen hundred and sixty-three, entitled 'An act to amend an act to establish a court for the investigation of claims against the United States,' approved February twenty-fourth, eighteen hundred and fifty-five. (15 Stat., 75.)

"Sec. 8. That it shall be lawful for said court, at the instance of the solicitor for the United States, to make an order in any case pending in said court, directing that the claimant or claimants in such case, or any one or more of them, shall appear, upon reasonable notice, before any commissioner of said court, and be examined upon oath or affirmation touching any or all matters pertaining to said claim. And the examination of such claimant or claimants shall be reduced to writing by the said commissioner, and be returned to and filed in said court, and may, at the discretion of the solicitor for the United States, be read and used as evidence on the trial of said cause." (12 Stat., 765.)

These laws reappear in the Revised Statutes in the following form:

"Sec. 1079. No claimant, nor any person from or through whom any such claimant derives his alleged title, claim, or right against the United States, nor

any person interested in any such title, claim, or right shall be a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person shall be used except as provided in the next section. (4 Ct. Cl., 1,512; 6 Ct. Cl., 241; 7 Ct. Cl., 121, 454; 8 Ct. Cl., 252; 10 Ct. Cl., 395; 13 Ct. Cl., 560.)

"SEC. 1080. The Court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof." (11 Ct. Cl., 575.)

Charles Dillingham was naval officer at the port of New Orleans, and one of the claimants for the fund in controversy in this suit, and any testimony he might give adverse to Bradley's claim was testimony "supporting" his own claim to the fund. The fund is the same. It is admitted, of course, that Dillingham was not claiming the fund from the United States through Bradley's suit; he was not a party to that suit; but he was directly interested in the event of that suit, and Bradley's defeat would as effectually support his claim as though he was a party and should win his case. He had the fund already in possession, and could keep it if Bradley's claim was defeated. His testimony against Bradley's claim was testimony in support of his own claim; and his own claim was as much a "claim against the United States" as Bradley's was. The subject matter, the fund, was the same in both cases.

It is very clear that it was no part of the purpose of Congress, in passing these laws, to give an unfair advantage to one claimant over another. It cannot have been expected that the courts would so construe them as to give one claimant to a fund, in the custody of the United States simply as a stake holder, the right to testify, and deny that right to another. Such construction would make the laws oppressive, and is not warranted by the evident purpose of Congress.

The government of the United States being, as this Court has said, an abstract entity, acting only through agents, and these frequently changed, would be at a disadvantage if parties claimant were allowed to testify in support of their claims against it. The Government could not oppose to them witnesses of like bias. To guard against such disadvantage these laws were passed. Their full purpose was and is to protect the Government. It was never dreamed that they would be pressed into the service of one claimant against another, in a matter wherein the Government was neutral; or, if interested, interested as much against the one as the other.

Appellant claims that the true construction of these laws excludes a witness from testifying where his testimony will tend to support a claim against the United States, even though that claim is only indirectly involved in the pending case. He must not testify against a claim when the defeat of that claim operates to support his own claim against the United States to the same fund. That is precisely what Dillingham's testimony does in the pending case. Dillingham has possession of one third of the fund sought to be reached by this action. He has given bond with sureties to return it to the Government if this suit is sustained. If it is defeated, he keeps the fund.

Both Dillingham and Sheldon would be barred from testifying wherever interested testimony is excluded.

"2. The interest which excludes a witness is a prospect of gaining some advantage or profit by the judgment in the cause in which he is called on to testify, and which would be the immediate consequences of such judgment." (Coquet *vs.* Creditors, 4 Lou., 201; Moffatt *vs.* Murray, 18 Lou., 357.)

"It is not necessary in order to render a witness incompetent that the record in the pending case should be evidence for or against him in a subsequent suit. It is enough that a decision of the cause in favor of the party calling him will prevent the witness' liability to a subsequent suit." (6 Paige, 81.)

3. As to Testimony Respecting Transactions with a Testator, Intestate, or Ward.

But we contend that the witness Dillingham, (and, perhaps, the witness Sheldon,) is barred from testifying against Bradley's administrator, under the circumstances of this case, by the following statute:

Rev. Stat., "Sec. 858. In the Courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court"

The *proviso* excludes either party from testifying against the other as to any transaction with or statement by the intestate.

The findings of fact by the Court of Claims show that the testimony of all the witnesses had reference to "transactions with or statements by" the intestate; and the order denying the motion (page 2) shows that the witnesses Dillingham and Sheldon testified "to defeat" the claim, or "against" the intestate's administrator.

The only question is, whether Dillingham, not being a "party" to the record, is within the prohibition of the statute. It is a question of construction. That Dillingham is the *real* party defendant, or one of them, is shown by the finding of facts. He has got the fund and has given an obligation with sureties to "return" it if this suit is maintained; otherwise he keeps it.

The defendants of record are uninterested, merely nominal. They are not the parties "meant" by the statute. (1 Woods, 625; 2 Dillon, 472; 31 Mich., 321; 37 Mich., 257; 38 Mich., 800.)

(100 U. S. 244; 15 Johnson, 380; 96 U. S., 42; 92 U. S., 268; 22 Wall., 492; 21 Wall., 648; 9 Wall., 655; 10 Wall, 406.)

The witness, Dillingham, having been a claimant to the same fund claimed by appellant, and having received the fund from the appellee upon giving a bond to return the same to the Treasury of the United States in case the Court of Claims, or this Court, on appeal, should decide in favor of any other claimant; and such bond having been given after the institution of this suit, and with notice of its institution and pendency; and the appellee being a mere holder of the fund for the benefit of the proper claimant, must be deemed, for the purposes of this suit, the *real* party thereto, although not a party to the record, and is concluded by the judgment rendered against the appellee.

"Trespass for *mesne profits* will lie against one who was in fact landlord, in possession by his tenents, and who actually defended the ejectment, though he did not appear on the record as defendant, and another party was admitted to defend as landlord with the consent of the plaintiff." (*vs.* Reinicker, 11 Wheaton, 280.)

And it makes no difference whether Dillingham appeared on the record or defended, or not; if he had an *opportunity* to defend, and did not, he is as much bound by the result as if he had defended. (Blasdale *vs.* Babcock, 1st Johnson, 517.)

And if he had notice of the suit he was bound to defend; and whether he did or not, the recovery will be conclusive against him. (Beers *vs.* Pinney, 12 Wendall, 309–10–11; 6 Johnson, 158; 7 Johnson, 168; 4 Cowan, 340.)

And his being a witness in the case was notice to him of the pendency of the suit so as to bind him. (Barney *vs.* Dewey, 13 John. R., 224–226.)

"A private party is concluded by a judgment recovered against his act or negligence, if he knew the suit was pending and could have defended it." (Chicago *vs.* Robbins, 2d Black, 418.)

An express notice to such party to defend the suit is not necessary to create such liability. (Chicago *vs.* Robbins, *supra* 2d Bl., 418.)

A plaintiff in attachment who indemnifies the attaching

officer, and afterwards takes upon himself the defense when the officer is sued, is concluded by the judgment against that officer, where such plaintiff is afterwards sued for the same trespass. (Lovejoy *vs.* Murray, 3d Wall., 1.)

(See, also, 1st Greenleaf on Evidence, secs. 522 and 523; Cromwell *vs.* County of Lee, 94 U. S., 351; Stout *vs.* Lye, 103 U. S., 66; Patton *vs.* Caldwell, 1st Dallas, 419.)

And, indeed, under the conditions of the bond given by Dillingham, no notice of the institution or pendency of the suit to him was necessary. (Lee *vs.* Clark, 1st Hill, N. Y., 56, 58.)

And, "if a person covenants for the results or consequences of a suit between others, the decree or judgment in such suit will be evidence against him, though he was not a party." (Rapelye *vs.* Prince, 4 Hill, N. Y., 119.)

CHAS. E. HOVEY,
ALEX. PORTER MORSE,
Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 188.

BRADLEY'S ADMINISTRATORS

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

In April and May, 1869, rumors prevailed in New Orleans that frauds had been, and were being, committed in the importation of sugars at that port.

In May, one Beares informed the collector, from information obtained of Bradley, that such frauds were being committed in *weights* and *classification*, but no facts were specified, nor did he know of any. On the 5th of June, the collector employed Beares and Bradley "to ferret out these frauds." Thereupon, they visited a schooner having sugar on board, and took samples and weights.

Finding, 3, 4, 5.

In April and May, 1869, the naval officer at New Orleans was also investigating certain suspicious circumstances that had come to his knowledge in connection with the importation of sugars there, and, on the 17th of June, appointed

Bradley as clerk in his office to be sent out to make examinations and *to act in investigating and seizing sugars, and in working up sugar cases.*

Findings, 6 and 7.

On the 29th of July, 1869, the sugars in question, being then in warehouses under the charge of a Government superintendent and storekeeper, were seized by an order from the superintendent to the storekeeper—there being then present the superintendent and other officials, including Bradley. No act of seizure occurred then, except the order.

Finding, 8.

Subsequently the sugars were condemned and sold, and their net proceeds were paid into the treasury, and distributed by the Secretary,—one-half to the United States, and one-fourth equally between the collector, surveyor and naval officer. The other *fourth* was claimed from the Secretary by Bradley, and by others, each claiming *all*, as informer or seizing officer; and the collector, surveyor and naval officer also claimed the same, on the ground that there was no informer or seizing officer.

In May, 1872, the Secretary distributed this fourth also to the collectors, &c., in accordance with their claim; requiring, however, a refunding bond from each of them in case it should be decided by a court that they were not entitled. Findings, 9, 10 and 11.

The first information of actual frauds in relation to said sugar was obtained by the naval officer, about June 12, 1869, through his own investigations, and thereupon he forbade their delivery from the warehouse to the importer.

The question is whether under the above circumstances Bradley was either *informer* or *seizing officer*, under the meaning of the Act of 1867, ch. 138; 14 Stat. 546.

That act, (Section 1,) after making provision for deducting

charges, expenses and duties from the proceeds of goods forfeited for breach of the custom laws, required that—

"The residue of the proceeds aforesaid shall be paid into the treasury of the United States, and distributed under the direction of the Secretary of the Treasury in the manner following, to wit: one-half to the United States; *one-fourth to the person giving the information which led to the seizure or to the recovery of the fine or penalty, and if there be no informer other than the collector, naval officer or surveyor, then to the officer making the seizure*; and the remaining one.fourth to be equally divided between the collector, naval officer and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred, or if there be only a collector, then to such collector. But where any fine, penalty or forfeiture incurred by virtue of the laws relating to customs shall be recovered in consequence of any information given by an officer of a revenue cutter, the proceeds thereof shall, after the legal deductions, including the deductions herein authorized have been made, be disposed of as follows: one-fourth to the United States, one-fourth to the officers of the customs, as hereinbefore provided; and the remainder to the officers of such revenue cutter, to be divided among them in proportion to their pay."

The second section authorized the proper district judge, whenever it appeared to him by complaint or affidavit that a fraud upon the revenue had been committed, to issue a warrant for seizing invoices, books, and papers, &c., "but no warrant for such seizure shall be issued, unless the complainant *shall set forth the character of the fraud alleged, the nature of the same, and the importations in respect to which it was committed*, and the papers to be seized."

A preliminary question appears upon the record, (folio 4,) in connection with a motion by the claimants to suppress the depositions of the naval officer and the surety upon his *refunding* bond, upon the ground that they were interested in the event of the suit, and that their depositions were not

taken in the manner pointed ~~at~~ out in sections 1079 and 1080 of the Revised Statutes.

The same objection is made again by the first and second requests for additional *findings*.

The general provision of section 858, of the Revised Statutes, rendering a witness competent, even although "a party to or interested in the issue tried," is qualified in section 1079, to the effect that "no claimant, nor any person from or through whom any such claimant derives his alleged title, claim, or right against the United States, nor any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person shall be used except as provided in the next section."

"The next section," 1080, provides that at the instance of the attorney for the United States, the court may make an order directing *the claimant* to be examined, &c.

It seems unnecessary to elaborate the proposition that the result of the above legislation is that the general rule doing away with incompetency of witnesses for interest is qualified in the Court of Claims only as to *witnesses called to support a claim*, and, therefore, that the admission of such witnesses can never be a subject of exception unless on behalf of the United States.

As for the principal question:

Bradley was not "*the person giving the information which led to the seizure*," nor was he "*the officer making the seizure*," within the meaning of the Statute above quoted.

This is well argued in the opinion of the learned court below, and, therefore, needs little to be said here.

(*a.*) He did not give *the information which led to the seizure.*

The *information* here intended is that which is the *proximate*, not the *remote*, cause of the seizure; for according to

a well-known maxim it is only the former class of causes that are at all regarded in the law.

I submit that the next section of the same statute, as quoted above, gives in connection with other proceedings in regard to the same frauds, a good description of what an *information* is, viz: *a statement setting forth the character of the fraud, its nature and the importations in respect to which it was committed.* That would naturally *lead* to a seizure, ~~as~~ for suggestions less definite, it appears that a search amongst them for the *first* person who gave what led *from informant to informant* up to seizure would be unending. Here at one time Bradley informed one Beares, of a general suspicion of fraud, ~~who~~ informed the collector, who then employed Bradley and Bears to ferret out the matter, although this seems not to have led to a seizure.

Again, in another conection Dillingham made investigations which induced him to suspect frauds by the very importer whose sugar was afterwards seized. This induced him to inquire for some suitable person as clerk in his office to work up the matter, and thereupon Bradley was employed, who proceeded to the bonded warehouses, examined and took samples of sugars, and carried them to the naval officer within a few days after they were seized.

Upon this branch of the case a valid objection to Bradley's being an *informer* seems to arise, as said below, from *his being under Government pay for the specific purpose of getting the sort of information which he gave.* The naval officer suspected the importer in respect to the very sugars, and had ordered that they should not be withdrawn from the custom-house. Therefore, *fervente opere*, he employed Bradley in the matter. What the latter did thereafter to justify his claim of being *informer*, was to visit the warehouse *so closed*, examine and take samples of the sugar *impounded*, and carry them to his superior officer.

b. Bradley did not seize the sugar.

It is submitted that the order given by the naval officer

about June 12, that the sugar should not be withdrawn from the custom house, (finding 6,) was, when obeyed, in effect *a seizure*, making him liable to the importer for damages, in case it had been unwarranted; and that what followed was merely in confirmation of that action, so that neither *information nor seizure* in the technical sense could have taken place subsequently, unless the previous assumption of dominion had been waived. As it turned out, however, what happened afterwards only confirmed the suspicion, and upon the 29th of July, and resulted in an order by the superintendent formally announcing a seizure. The goods, however, had then for nearly seven weeks been in the hands of an officer of the government, at the same port, under proceedings in defiance of the owner, and looking to forfeiture; and if those proceedings had proven to be unfounded, it seems idle to say that Bradley would have beeen responsible in damages to the owner; or indeed that he ever became so. He did not put himself forward as *seizor* until there were proceeds to divide; and such delay is treated as fatal in The Josepha Segunda, 10 Wheaton, page 326.

Whatever might be said as to the time of seizure, in case there had been a controversy upon this point between the naval officer and the superintendent, I submit, that under the present circumstances, the final condemnation appears upon the record, to be founded upon a previous continuous possession hostile to the owner, and looking to condemnation, that dated back to "about June 12th, 1869." This seems to be a paraphrase for *seizure*. Nothing which happened subsequently to the commencement of *that*, can be said to have "*led*" to it.

S. F. Phillips,
Solicitor General.

14-444

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~345.~~ 99

DANIEL H. WELLS, WILLIAM LIVINGSTON, AND B. B. BITNER, PLAINTIFFS IN ERROR,

vs.

JOHN NICKLES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED NOVEMBER 23, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 345.

DANIEL H. WELLS, WILLIAM LIVINGSTON, AND B. B. BITNER, PLAINTIFFS IN ERROR,

vs.

JOHN NICKLES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

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1 Be it remembered, that on the 18th day of September, A. D. 1877, there was filed in the office of the clerk of the supreme court of the Territory of Utah, a transcript of the record and proceedings in and of a certain cause theretofore pending in the district court of the third judicial district of said Territory in which John Nickles was plaintiff and Daniel H. Wells and others were defendants, of which said transcript the following is a copy, to wit:

2 District court, third judicial district.

TERRITORY OF UTAH,
Salt Lake County:

JOHN NICKLES, PLAINTIFF,
vs.
DANIEL H. WELLS, WILLIAM LIVINGSTON, & B. B. Bitner, defendants.

The plaintiff complains of the defendants and for a cause of action alleges and shows that on the 28th day of September, 1876, he was, ever since has been, and now is the owner of large quantities of unmeasured lumber and logs, five hundred thousand feet more or less of pine lumber and logs, which on the 1st day of October, 1876, was situate at and near mills called respectively mills E & F in Big Cottonwood Cañon, Salt Lake County, Territory of Utah, of the value of four thousand five hundred dollars, and consisting of forty thousand or more feet of sawed lumber and fifty thousand or more feet of lath, near to and on the north side of mill E; eighty thousand or more feet of pine sawed lumber, near to and on the north side of mill F; two hun-
3 dred thousand or more feet of lath and one hundred thousand or more feet of lumber in logs in and near the center of the yard at said mill F; that on or about the 3rd day of October, 1876, the defendants unlawfully took said property from the possession of the plaintiff at Big Cottonwood Cañon aforesaid, and wrongfully detain & withhold the same from his possession, to his damage of one thousand dollars over and above the value of said property.

Wherefore plaintiff demands judgement against the defendants for the recovery of the possession of said property, or for the sum of four thousand five hundred dollars, the value thereof, with interest from Oct. 3rd, 1876, in case a delivery cannot be had, and for one thousand dollars damages and costs of suit.

Dated Oct. 7th, 1876.

BENNETT & HARKNESS,
Pl'ff's Att'ys, Salt Lake City, Utah.

TERRITORY OF UTAH,
Salt Lake County, ss:

John Nickles, being duly sworn, says he is the plaintiff in this action and knows the contents of his foregoing complaint, and that said complaint is true of his own knowledge.

JOHN NICKLES.

4 Subscribed and sworn to before me this 11th day of Oct., 1876.
[SEAL.] R. G. KURSO,
Notary Public.

(Indorsed:) 3rd district court. John Nickles vs. D. H. Wells et al. Complaint. Filed Oct. 11th, 1878. C. S. Hill, clerk. Bennett & Harkness, att'ys for pl'ff.

5 In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN NICKLES, PLAINTIFF, *vs.* DANIEL H. WELLS, WM. LIVINGSTON, B. B. Bitner, defendants.	Undertaking on claim and delivery of personal property.

Whereas it is alleged by the plaintiff in the above entitled action that the defendants in said action have in their possession and unjustly detain certain personal property belonging to the said plaintiff, to the possession of which the said plaintiff is lawfully entitled, of the value of four thousand and five hundred dollars. And whereas the said plaintiff being desirous of having the said personal property delivered to him, and by endorsement in writing upon the affidavit has required the United States marshal for Utah to take the said property from the said defendant:

Now, therefore, we, the undersigned, residents of the said Salt Lake County, in consideration of the premises, and of the delivery of
6 said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are jointly and severally bound in the sum of nine thousand (9,000) dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action, for the return of the said property to the said defendant, if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against the said plaintiff.

Dated this seventh day of October, A. D. 1876.

JOHN NICKLES. [SEAL.]
J. E. BAMBERGER. [SEAL.]
W. W. CHISHOLM. [SEAL.]

TERRITORY OF UTAH,
County of Salt Lake, ss:

J. E. Bamberger and W. W. Chisholm, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says, that he is a resident and householder within the said Salt Lake County, and that he is worth double the sum specified
7 in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. E. BAMBERGER.
W. W. CHISHOLM.

Subscribed and sworn to before me this eleventh day of October, A. D. 1876.

[SEAL.]

R. G. KNOX,
Notary Public.

OFFICE U. S. MARSHAL.

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within undertaking on claim and delivery of personal property in Salt Lake County, Utah Territory, on the 12th day of October, 1876, on the within named defendant person-

ally, to wit, Daniel H. Wells, by delivering to him a true copy of the within undertaking.

Dated October 13th, 1876.

WILLIAM NELSON,
U. S. Marshal.
By A. K. SMITH, *Deputy.*

8 OFFICE U. S. MARSHAL.

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within undertaking on claim and delivery of personal property in Salt Lake County, Utah Territory, on the 13th day of October, A. D. 1876, on the within named defendants personally, to wit, William Livingston and B. B. Bitner, by delivering to each of them a true copy of the within undertaking.

Dated Oct. 13, 1876.

WILLIAM NELSON,
U. S. Marshal,
By J. FRED. CO. KER,
Deputy.

(Indorsed:) No. 2752. District court, third judicial district, county of Salt Lake. John Nickles, plaintiff, vs. Daniel H. Wells et al., defendant. Undertaking on claim and delivery of personal property. Attorney for plaintiff. Approved October 11th, 1876. William Nelson, U. S. marshal, by John W. Greenman, deputy. Filed Oct. 23d, 1876. C. S. Hill, clerk.

9 *Affidavit on claim and delivery of personal property.*

In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN NICKLES, PLAINTIFF,
vs.
DANIEL H. WELLS, WM. LIVINGSTON, B. B. Bitner, defendants.

TERRITORY OF UTAH,
County of Salt Lake, ss:

John Nickles, being duly sworn, says that he is the plaintiff in the above entitled action. That the said plaintiff is the owner of and is now lawfully entitled to the possession of the following described personal property, to wit: Five hundred thousand feet of pine lumber and logs, situate on the 1st of Oct., 1876, at & near mills called respectively mills E & F, in Big Cottonwood Cañon, Salt Lake County, Utah, consisting of about 40,000 feet of lumber & about 50,000 feet of lath, near to and on the north side of mill E, 80,000 feet of lumber near to and
10 on the north side of said mill F, 200,000 feet of lath and also 100,000, feet of lumber in logs in and near the center of the yard at mill F, about 1,500 feet of lumber 1¼ miles west of Silver Springs in the cañon, about 8,000 feet at Silver Springs, and 2,700 feet at Burnt Cabin up Silver Fork. That the said property is in the possession of, and wrongfully detained by, the defendants in the said action; that the alleged cause of the detention of said property, according to this affiant's best knowledge, information and belief, is the following to wit:

That the defendant Daniel H. Wells claims to own said lumber and logs, and that the other defendants are acting as his agents and servants; deponent has neither knowledge, information or belief as the grounds of ownership alleged by said Wells, but believes the same wholly unfounded. That the said property or any part thereof has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or an attachment against the property of said plaintiff, and that the actual value of said property is four thousand and five hundred ($4,500) dollars.

JOHN NICKLES.

Subscribed and sworn to before me this eleventh day of October, A. D. 1876.

[SEAL.] R. G. KURSO,
Notary Public.

11 TERRITORY OF UTAH,
County of Salt Lake, ss:

The United States marshal for Utah is hereby ordered and required to take from the defendant named in the within entitled action, the within mentioned and described personal property (if the said property be found in said Territory).

Dated this eleventh day of October, A. D. 1876.

BENNETT & HARKNESS,
Attorneys for Plaintiff.

OFFICE U. S. MARSHAL.

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within affidavit on claim and delivery of personal property and order of delivery in the county of Salt Lake, Territory of Utah, on the 12th day of October, 1876, on the within-named defendant personally, to wit, Daniel H. Wells, by delivering to him a true copy of the within affidavit.

Dated Oct. 12th, 1876.

WILLIAM NELSON,
U. S. Marshal,
By A. K. SMITH, *Deputy.*

12 OFFICE U. S. MARSHAL.

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within affidavit on claim and delivery of personal property and order of delivery, in the county of Salt Lake, Territory of Utah, on the 13th day of Oct., 1876, on the within-named defendant personally, to wit, Wm. Livingston & B. B. Bitner, by delivering to each of them a true copy of the within affidavit, and at the same time taking possession of the property described in the within affidavit, and the defendants having given a redelivery bond as provided for by law and within the time specified by law, I have delivered the within mentioned and described property to the defendants in this action.

Dated Oct. 18th, 1876.

WILLIAM NELSON,
U. S. Marshal,
By J. FRED. CORKER, *Deputy.*

(Indorsed:) No. 2752. District court, third judicial district, county of Salt Lake. John Nickles, pl'ff., vs. Dan'l H. Wells et al. def'ts. Affidavit on claim and delivery of personal property. Filed Oct. 23d, A. D. 1876, C. S. Hill, clerk. Bennett & Harkness, att'ys for pl'ff.

13 In the district court in and for the third judicial district of Utah Territory, county of Salt Lake.

JOHN NICKLES, PLAINTIFF,
vs.
DANIEL H. WELLS, WILLIAM LIVINGSTON, & B. B. Bitner, defendants.

The people of the United States in the Territory of Utah send greeting to Daniel H. Wells, William Livingston, and B. B. Bitner, defendants:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county but in this district within twenty days, other-
14 wise within forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to recover the possession of 500,000 feet, more or less, of pine lumber and logs situated at or near mills E & F in Big Cottonwood Cañon, Salt Lake County, Utah Territory, or for the sum of four thousand five hundred dollars, the value thereof, with interest from Oct. 3rd, 1876, in case a delivery cannot be had, and for $1,000 damages and for costs of suit.

You are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded herein.

Witness the Hon. Michael Schaeffer, judge, and the seal of the district court of the third juicial district, in and for the Territory of Utah, this 11th day of October, A. D. 1876.

[ ]

C. S. HILL, *Clerk*,
By W. P. McBRIDE,
Deputy Clerk.

15 OFFICE U. S. MARSHAL.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I hereby certify that I served the within summons in the county of Salt Lake, Territory of Utah, on the 13th day of Oct., A. D. 1876, on the within named defendants personally, to wit: William Livingston and B. B. Bitner, by delivering to each of them, personally, a true copy of the within summons.

Dated Oct. 13th, 1876.

WILLIAM NELSON,
U. S. Marshal,
By J. FRED. CORKER,
Deputy.

OFFICE U. S. MARSHAL.

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within summons in the county of Salt Lake, Territory of Utah, on the 12th day of Oct., A. D. 1876, on the within named defendant personally, to wit: Daniel H. Wells, by delivering to him a true copy of the within summons with a duly certified copy of the complaint in this action attached thereto.

Dated Oct. 13th, 1876.

WILLIAM NELSON,
U. S. Marshal,
By O. K. SMITH, *Deputy.*

Fees, $44.00.

(Indorsed:) No. 2752. District court, third judicial district, county of Salt Lake. John Nickles, plaintiff, vs. Daniel H. Wells et al., defendants. Summons. Burnett & Harkness, plaintiff's atty's. Filed on return Oct. 23rd, 1876. C. S. Hill, clerk.

16 *Separate answer of Daniel H. Wells.*

District court, 3rd district.

TERRITORY OF UTAH,
Salt Lake County:

JOHN NICKLES
vs.
DANIEL H. WELLS ET AL.

And now comes the defendant, Daniel H. Wells, and for his separate answer to the complaint of the plaintiff in the above-entitled action, denies,

That on the 28th day of September, 1876, the said plaintiff was, or at any time before or since then, has been or now is the owner of five hundred thousand feet or any other number of feet of unmeasured or measured pine lumber and logs in his said complaint described, situate in Big Cottonwood Cañon, Salt Lake County and Territory of Utah, near the mills called respectively mills E and F, or elsewhere, of the value of four thousand five hundred dollars, or any other sum, consisting of forty thousand feet or more, or any number of feet, of sawed lumber, or of fifty thousand feet or more, or of any number of feet, of lath, near
17 to or on the north side of mill E, or elsewhere, or of eighty thousand feet or more, or of any other number of feet, of pine sawed lumber near to or on the north side of mill F, or elsewhere, or of two hundred thousand feet or more, or any number of feet, of lath, or of one hundred thousand feet or more, or any number of feet, of lumber in logs, in and near the centre of the yard at said mill F, or elsewhere, and avers that the pretended right to the possession of said property by plaintiff is claimed to have accrued to him by virtue of a pretended sale of said property by Oliver A. Patton, register of the United States land office, at Salt Lake City, and Richard Greenway, deputy timber agent of the United States, as timber agents of the United States after the said parties had been enjoined from making sale of the same by process regularly issued out of and under the seal of this court, in an action therein pending in which Daniel H. Wells (this defendant) was plaint-

iff and said Patton & Greenway were defendants, and in which said action the right and title to the goods and chattels in complaint described was and is involved, which said injunction has been duly
18 served upon said Patton and Greenway, prior to said pretended sale, and of all of which said plaintiff had notice at the time of said pretended sale, and of all of their doings in and about said pretended sale, said Patton and Greenway were acting in violation of said injunction and in contempt of the mandate of this court, and which said pretended sale was made upon a pretended seizure purporting to be made by Oliver A. Patton, as register, & V. M. C. Silva, as receiver of the United States land office, at Salt Lake City, Utah, whereas as matter of fact said defendant avers upon his information and belief that the said Silva, as receiver of the United States land office aforesaid, did not join in said pretended seizure or sale, as timber agent of the United States, or otherwise, nor did the said Greenway have the joint authority of the said register & receiver to sell said property. And defendant further denies that on the 30th day of October, 1876, or at any time this defendant or either of his co-defendants unlawfully, or otherwise, took the pos-
19 session of said above-described property from the said plaintiff at Big Cottonwood Cañon aforesaid, or elsewhere, or that said defendant, or either of them, wrongfully detain or withhold the same from the possession of said plaintiff; and denies that the plaintiff is damaged by any acts of the defendants, or either of them, in the sum of one thousand dollars over and above the value of said property, or in any sum whatever, or to his damage in any manner or in any sum of money whatever.

2nd. And for further answer and defence the said defendant avers that this defendant was on the 28th day of September, 1876, for a long time prior thereto had been and still is the owner, and entitled to the possession of the logs, lumber, and laths in said complaint described. That he purchased the logs, from which the lumber and laths in said complaint described, and the unmanufactured logs also therein described, in good faith and for a valuable consideration, from one Archie Livingstone (now deceased) and one Jeremiah Langsford
20 & Co., and received the possession thereof from said parties; that the purchase of said personal property was made as aforesaid at sundry times in the years 1874, 1875, and 1876 by this defendant from the said Livingstone and J. Langsford & Co.; that on or about the 26th day of June, 1875, a seizure, to wit, of two-thirds of the property described in said complaint, was made by Oliver A. Patton and V. M. C. Silva, as register & receiver of the United States land office at Salt Lake City, Utah, and J. J. Heffernan & Wm. McKay, as timber agents of the United States, they claiming that the same was the property of the United States, in that it had been cut upon the public lands belonging to the United States, and said last-named parties advertized the said property to be sold as property belonging to the United States on the 22nd day of July, 1875; that before the date of said intended sale this defendant commenced in this court against the said Oliver A. Patton, V. M. C. Silva, J. J. Heffernan, & Wm. McKay, an action
21 for the recovery of the possession of said property, alleging and claiming to be the owner and entitled to the possession thereof; that afterwards, to wit, on or about the 10th day of July, 1875, defendants Patton and Silva were duly served with the process of said court, and appeared therein by Marshall & Regle and J. C. Hemingway, their attorneys, and after certain proceedings were had therein, entered into a stipulation with the plaintiff therein, by his attorneys, Sutherland &

Bates, which said stipulation is in the words and figures following, to wit:

In the district court for the third judicial district of the Territory of Utah.

DANIEL H. WELLS
vs.
OLIVER A. PATTON, V. M. C. SILVA, J. J. HEFFERNAN, and Wm. McKay, timber agents for the Territory of Utah.

It is hereby stipulated by said parties as follows: In consider-
22 ation of the bond to be executed by said plaintiff as below stated and his stipulation herein, said defendants hereby release the property from seizure mentioned in the complaint filed in this action, and will discontinue the publication of the notice of sale thereof, and will not hereafter meddle with said property, or interfere with plaintiff's use thereof, for his own use and benefit. Said plaintiff, in consideration of the above, hereby agrees that he will not discontinue this suit without the defendant's consent, but will prosecute the same with diligence to final judgement, and will now give bond with sufficient surety to pay such sum as he be adjudged to pay by final judgement on the merits of this action. The plaintiff also agrees to advance the money to pay the costs of the seizure mentioned in the complaint and all costs connected therewith, including advertising, and if the plaintiff shall not be found liable to pay such costs and charges so paid by said advance, the moneys so paid shall be deducted from the amount otherwise awarded, if
23 any, against him by such final judgements.

(Signed) SUTHERLAND & BATES, *Pl'ff's Att'ys.*
MARSHALL & REGLE & HEMINGWAY.
Att'ys for Def'ts.

That this defendant made the payments in said stipulation referred to on the same day, to wit, July 10th, 1875, which amounted to the sum of three hundred and twelve dollars, and that thereupon, and upon the execution of said stipulation making the payment aforesaid, and giving the bond therein provided for, the defendants in said suit released and delivered said property to said plaintiff, this defendant; that this defendant in all things complied with the terms of said stipulation, and from thence became and still is the owner and entitled to the possession of over $\frac{2}{3}$ of the property in said plaintiff's complaint described; that the remainder of the property claimed by the plaintiff herein in his said complaint, as nearly as can be ascertained, was purchased from Jeramiah Langsford & Co. in the year 1876, and it having been
24 claimed by Richard Greenway, as timber agent of the United States, that the same, or a portion thereof, had been cut on the public lands of the United States, the "stumpage" alleged to be due thereon was duly paid by this defendant to the register and receiver of the United States land office at Salt Lake City, Utah.

3rd. And for a further answer said defendant avers that the said personal property described in the complaint of the plaintiff has been greatly enhanced in value by the expense and labor of this defendant and the aforesaid Archie Livingston and Jeramiah Langsford & Co., from whom this defendant purchased the same, to wit, to the value of nine-tenths of what the same was worth when standing in trees or on the stump on

the land from which the same was taken, that is to say, from $6.00 per thousand on the stump to $20.00 per thousand as the manufactured lumber now is.

Fourth. And for a further answer and defense the defendant
25 avers, that heretofore, to wit, on or about the fourth day of September, 1876, the aforesaid Oliver A. Patton and one Richard Greenway, claiming to act as timber agents of the United States, had again seized and advertised said personal property in the complaint described for sale, as property cut from the public lands of the United States. That the said Daniel H. Wells, on the 16th day of September, 1876, duly commenced his certain action against the said Patton and Greenway in this court for the recovery of the possession of said personal property. That process in said action under the seal of said courts was duly issued and served upon the defendants therein; that such proceedings were had in said action; that said property was taken by the sheriff of Salt Lake County, Utah Territory, and after being by said sheriff held for the period of five days, and no counter bond or undertaking having been given or filed by the defendants therein, as required by the statute in such case made and provided, the said
26 sheriff delivered the said property to the plaintiff in said action; all of which will more fully appear by reference to the files and records of said action now pending in this court. That said action was brought to test the title of the plaintiff and defendants therein to the right of possession of said property; that it was pending on the 28th day of September, 1876, and is still pending and undetermined.

Wherefore, defendant asks judgment for the return of said property to him, that he be declared the owner thereof, & for costs of suit.

D. COOPER, WOODS & GEE,
Def'ts' Att'ys.

TERRITORY OF UTAH,
Salt Lake County, ss:

Daniel H. Wells, being duly sworn, says that he is defendant herein; that he knows the statements in foregoing answer, and that they are true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

DANIEL H. WELLS.

Subscribed & sworn to before me Oct. 24th, 1876.
[SEAL.] JAMES JACK,
Notary Public for Salt Lake Co., Utah.

(Indorsed:) # 2752. John Nickles vs. Dan'l H. Wells et al. Separate answer of D. H. Wells. Service by receipt of copy accepted Oct. 26th, 1876. Bennett & Harkness, pl'ff's att'ys. Filed Oct. 26th, 1876. C. S. Hill, clerk. D. Cooper, Woods & Gee, att'ys.

27 *Seperate answer of William Livingstone & B. B. Bitner.*

District court, 3rd dist.

TERRITORY OF UTAH,
Salt Lake County:

JOHN NICKLES
vs.
DANIEL H. WELLS, WILLIAM LIVINGSTON, AND B. B. Bitner.

And now comes the above-named defendants, William Livingston

and B. B. Bitner, and for answer to the complaint of the plaintiff in the above entitled action, for themselves, and each of them, disclaim that they, or either of them, claim any right, title, or interest in or to the personal property in plaintiff's complaint described, or to the possession thereof, or that they, or either of them, hold possession thereof, except as the agents of their co-defendant, Daniel H. Wells, who claims to be and, as defendants are informed and believes, is the owner, and entitled to the possession of said personal property.

WOODS & GEE &
D. COOPER,
Def'ts' Att'y.

28 TERRITORY OF UTAH,
Salt Lake County, ss:

, being duly sworn, says that he has read the foregoing answer, and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

Sworn to and subscribed before me this day of October, 1876.

(Indorsed:) John Nickles vs. D. H. Wells et al. Seperate answer of Livingstone & Bitner. Copy rec'd Oct. 30th, 1876. Bennett & Harkness, pl'ff's att'ys. Filed Oct. 30, 1876. C. S. Hill, clerk, by W. P. McBride, deputy clerk.

29 *Subpœna.*

In the district court of the third judicial district of the Territory of Utah, Salt Lake County.

J. NICKLES, PLAINTIFF,
against
D. H. WELLS, DEFENDANT.

The people of the United States in the Territory of Utah send greeting to M. M. Bane, O. A. Patton, Wm. M. McKay:

We command you that, all and singular business excuses being laid aside, you appear and attend before the third judicial district court of the Territory of Utah, at a term of said court to be held at the court-house, in Salt Lake City, on the forthwith, then and there to testify in the above entitled action, now pending in said district court, on the part of the defendant, and disobedience will be punished as contempt of court.

30 Witness Hon. M. Schaeffer, judge of the 3rd judicial district court in and for Utah Territory, this 1st day of June, A. D. 1877.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.]

C. S. HILL, *Clerk,*
By B. P. HILL,
Deputy Clerk.

U. S. MARSHAL'S OFFICE.

TERRITORY OF UTAH,
Salt Lake County, ss:

I hereby certify that I served the within subpœna, in Salt Lake

County, Territory of Utah, on the 1st day of June, 1877, on the within named witnesses personally, to wit, M. M. Bane & O. A. Patton, by reading the within subpœna to each of them.

Salt Lake City, Utah, June 1st, 1877.

Fees, $1.56.

WILLIAM NELSON,
U. S. Marshal,
By GEORGE M. CROWE,
Deputy.

31 (Indorsed:) No. 2752. District court, third judicial district, county of Salt Lake. J. Nickles, plaintiff, against D. H. Wells, defendant. Subpœna. Filed June 1st, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I hereby certify that I served the within subpœna, in the county of Salt Lake, Utah Territory, on the first day of June, 1877, on the within named witness, to wit, William McKay, by reading the same to him personally.

WILLIAM NELSON,
U. S. Marshal,
By J. W. GREENMAN,
Deputy.

32 JOHN NICKLES, PL'FF,
vs.
DANIEL H. WELLS AND OTHERS, DEF'TS.

The plaintiff asks the following instructions to be given to the jury:

1st. To make a case entitling the plaintiff to recover it is only necessary for the plaintiff to show, by a preponderance of the testimony, that the logs in question, and the logs from which the lumber in question was made, were cut on government lands seized by the timber agents and sold to the plaintiff, and that the defendants detained the logs and lumber from the plaintiff.

Given.—M. S., *Judge.*

2nd. If the defendants, or any of them, claim the trespass has been compromised by paying the government stumpage, it is for such defendants or defendant to prove as a defence the settlement & actual payment of the stumpage.

Given.—M. S., *Judge.*

33 3rd. The fact that stumpage was paid for 5,000 feet in July or August, 1876, does not invalidate the seizure & sale of the remainder of the logs & lumber, but the plaintiff cannot recover that 5,000 feet.

Given.—M. S., *Judge.*

4th. The value of the lumber seized and sold to pl'ff should be assessed at its fair cash value at the mills, if the plaintiff as entitled to recover, deducting, however, the 5,000 feet, on which stumpage was paid.

Given.—M. S., *Judge.*

34 JOHN NICKLES, PL'FF,
vs.
DAN'L H. WELLS AND OTHER DEF'TS.

We, the jury, find for the plaintiff, that at the commencement of this

action he owned and was entitled to the possession of the property described in the complaint; that the defendants wrongfully detained the same; that the value of the lumber detained is sixteen hundred and fifteen ($1.615) dollars, and plaintiff's damages one hundred and eighty-five ($185) dollars; total amount, eighteen hundred ($1,800) dollars.

JAMES DWYER,
Foreman of Jury.

(Indorsed:) John Nickles vs. Daniel H. Wells et al. Verdict rendered June 2nd, 1877. Filed June 2nd, 1877. C. S. Hill, clerk, by B. P. Hill, deputy clerk.

35 *Statement of wit's.*

JOHN NICKLES
vs.
DAN'L H. WELLS ET AL.

Richard Greenway,	11 miles,	2 days			4 10
James Spillet,	11 miles,	2	"		4 10
Wm. McGee,	11	" 2	"		4 10
Alex. McGee.	11	" 2	"		4 10
Sam. Edgarly,	11	" 2	"		4 10
R. H. Wilson,	11	" 2	"		4 10
Dicks,	11	" 2	"		4 10
Chr's Cook,	one	" 2	"		3 10
					$31 80

TERRITORY OF UTAH,
Salt Lake County, ss:

John Nickles being duly sworn says each of the above named witnesses attended the trial of this action as wit's for plaintiff for the number of days set forth in the foregoing statement, and travelled the number of miles stated to attend said trial; & that each was considered a necessary & material witness for deponent.

JOHN NICKLES.

Subscribed and sworn to before me June 2nd, 1877.

C. S. HILL, *Clerk,*
By B. P. HILL,
Deputy Clerk.

36 *Memorandum of costs and disbursements.*

In the district court in and for the third judicial district of Utah Territory, county of Salt Lake.

JOHN NICKLES, PLAINTIFF,
vs.
DAN'L H. WELLS ET AL., DEFENDANTS.

Disbursements:

Marshall's fees	$44 00
Clerk's fees	13 90
Witness' fees	31 80
Att'ys	20 00
	109 70

TERRITORY OF UTAH,
County of Salt Lake, ss:

Robert Harkness, being duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff; that the items in the above memorandum contained are
37 correct, to the best of said affiant's knowledge and belief; and that the said disbursements have been necessarily incurred in said action, except as, to wit., as to which deponent refers to the annexed affiant.

ROB'T HARKNESS.

Subscribed and sworn to before me this 2nd day of June, A. D. 1877.
C. S. HILL, *Clerk*,
By B. P. HILL,
Deputy Clerk.

Filed June 2nd, 1877. C. S. Hill, clerk, by B. P. Hill, deputy clerk.

38 *Judgement on verdict.*

In the district court of the 3rd judicial district of the Territory of Utah, in and for the county of Salt Lake.

JOHN NICHOLS, PLAINTIFF,
against
DANIEL H. WELLS, WILLIAM LIVINGSTON, &
B. B. Bitner, defendants.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve (12) persons was regularly impanneled and sworn to try said action. Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names and say they find a verdict for the plaintiff, as follows: We, the jury, find for the plaintiff that, at the commencement of this action, he owned and was entitled to the
39 possession of the property described in the complaint; that the defendants wrongfully detained the same; that the value of the lumber detained is sixteen hundred and fifteen ($1,615) dollars and plaintiff' damages, one hundred and eighty-five ($185.00) dollars. *Fatal* amount, eighteen hundred ($1,800) dollars.

JAMES DWYER,
Foreman of Jury.

It is now considered and adjudged that the plaintiff, John Nickles, have and recover of and from the defendants the possession of the property described in the complaint, and that the same be delivered to him, or, in case a delivery thereof cannot be had, that the said plaintiff have and recover of and from the said defendant, Daniel H. Wells, the sum of eighteen hundred dollars, the value of the property, and damages for the detention as aforesaid, and the further sum of one hundred & nine & $\frac{70}{100}$ dollars, the costs and disbursements of this action, amounting to the sum of $1,909 $\frac{70}{100}$, and that pl'ff have execution accordingly.

40 Judgment rendered June 2nd, A. D. 1877.

Clerk's office of the district court of the third judicial district of the Territory of Utah, in and for the county of Salt Lake, ss:

I, the undersigned, clerk of the said court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action.

Attest my hand and the seal of said court this 2nd day of June, A. D. 1877.

[SEAL.] C. S. HILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

No. 2752. District court, third judicial district, county of Salt Lake. John Nickles, plaintiff, against Daniel H. Wells et al., defendant. Judgment on verdict. Filed June 2nd, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

41 *Statement on appeal.*

In the district court for the third judicial district of the Territory of Utah, Salt Lake County.

JOHN NICKLES, PLAINTIFF,
vs.
DANIEL H. WELLS, WILLIAM LIVINGSTON, AND B. B. Bitner, defendants.

The defendants Daniel H. Wells and B. B. Bitner, intending to appeal from the judgment rendered in favor of said plaintiff in this action to the supreme court of said Territory, and complaining of certain rulings of the said district court on the trial, the following statement of the case is made, to be annexed to the record, be used on such appeal:

On the first day of June, 1877, said action came on to be tried before said district court for the third judicial district and a jury for that purpose duly empanneled and sworn.

On said trial the plaintiff, to maintain & prove the issues on his side, introduced evidence tending to show that the property mentioned in the complaint filed in this action was lumber and logs cut from
42 timber standing & growing upon the public lands of the United States, and was so cut and removed to the mills mentioned in said complaint in the years 1874, 1875, and 1876; that said mills since before 1874 have been the property in the possession of and operated by said defendant, Daniel H. Wells; that said logs and lumber were in his possession and claimed by him as his property at the time of the commencement of this action; that from and after July 1st, 1876, said defendant Bitner has been the agent and servant of said Daniel H. Wells, having charge of and superintending the operation of said mills; that from May, 1875, until October, 1876, Oliver A. Patton and M. V. C. Silva, have been register and receiver of the United States land office for the district of lands subject to entry at Salt Lake City in said Territory.

The said plaintiff also offered and put in evidence, from the files of said land office, the following circular and letters of instructions from the Commissioner of the General Land Office, to wit:

43 DEPARTMENT OF THE INTERIOR,
General Land Office, December 24, 1855.

GENTLEMEN: The Secretary of the Interior has concluded to change the present system of timber agencies, and to devolve the duties connected therewith upon the officers of the local land districts. By his direction therefore, you will, upon the receipt of these instructions, take charge of the timber business within the limits of your land district, as a part of the general duties of your office, and it is accordingly hereby assigned to you, as such, with the understanding that hereafter it is to be considered and held as a proper incident to, and in fact a part of your general duties, covered and satisfied by the salary which the law provides for your respective offices.

That you may understand the nature of this part of your duties, your attention is directed to the following:

1st. Attorney-General Wirt, in an opinion of the 27th of May, 1821, holds as follows:

"Independent of the positive legislative provisions, I apprehend that, in relation to all property, real or personal (p. 32, Record) which the United States are authorized by the Constitution to hold, they have all the civil remedies, whether for the prevention or redress of injuries,
44 which individuals possess (see 3 Wheaton, 181), so the United States being authorized to accept, and to hold the lands for the common good, must have all the legal means of protecting the property thus confided to them, that individuals enjoy in like cases. * * * They are, therefore, in my opinion, entitled to the injunction of waste, by way of prevention, and to the action of trespass, by way of punishment, in like manner as individuals similarly situated are entitled to them."

2d. Attorney-General Taney, now Chief Justice of the United States, in an opinion of the 22d of August, 1833, cites this opinion of Mr. Wirt, and concurs in it.

3d. Attorney-General Mason, in a communication of the 16th of July, 1845, refers to the opinion of Attorney-General Nelson, of the 11th of August, 1843, and in concurring in it states that, "when the right of pre-emption exists, the settler who has complied with the provisions of the act of 4th Sept., 1841, has a right of occupancy for twelve months, within which (p. 33, Record) he may perfect his title by paying the minimum price of the land. Like the settlers under the armed occupation act, his right is inchoate only, and he has only those rights of property which are necessary to the protecting of his title. He may clear the land, build on it, and enclose it with a view of cultivation. For these purposes he may use or destroy any trees which may be necessary, but within these restrictions and necessary fire-wood he is confined.

"The penal act of 2d March, 1831, provides for the punishment of offenses committed in cutting, destroying, or removing live oaks and other timber or trees preserved for naval purposes."

This act of 2d March, 1831, you will find fully considered in the case of the United States vs. Ephraim Briggs, 9 Howard, 351, in which
45 the Supreme Court decided that the said act authorized the prosecution and punishment of all trespassers on public lands by cutting timber, whether such timber was fit for naval purposes or not.

4th. Under no circumstances will you compound or compromise with any such trespassers, or receive any pay or compensation from them as acquittal or discharge therefrom, or in any other manner. Neither will you give any permission to cut timber or otherwise trespass on the public lands, as there is no authority for any such proceeding; but all such

offenses against the law must be prosecuted and tried by the authorities duly constituted for that purpose.

5th. Should you find such trespass committed on swamp lands, or those which are rendered unfit for cultivation by overflow, you will take no further action than to notify the governor of the State, as all such lands issue to the State under the act of 28th Sept., 1850.

6th. In the enforcement of said act of 1831, you should be careful not to interfere with pre-emption rights under the act of September 4th, 1841; the settler, with a view to cultivation, having the right, as hereinbefore indicated, to use or destroy trees in clearing roads and constructing bridges, or for any other purposes connected with the improvement of his homestead.

7th. While thus liberal to the honest settler, you should be vigilant to detect and arrest (p. 35, Record) the speculator, who in the guise of a settler, and under the sanction of a declaratory statement, may contemplate the spoliation of timber, and, unless arrested, might seriously injure the public domain.

8th. Where the trespassers are unknown or known, and timber has been cut or removed off the public lands, you will cause it to be
46 seized and sold at auction to the highest bidder, under such regulations as sound discretion may suggest.

9th. All moneys, the proceeds of the sale of timber, received by you must be deposited in some one of the United States depositories to the credit of the judiciary fund, without abatement, and an immediate report made of the same to this office, with a full statement of all particulars duly verified.

10th. In the prosecution of your duties you may, upon any pressing emergency, deputize a reliable person to investigate and report the facts involved in any supposed case of trespass, and allow a per diem of three dollars and a mileage at the rate of ten cents per mile. In making any such appointment you will report the fact instanter and the necessity for it, and will (p. 36, Record) require, in the affidavit of the employee, a statement of the time actually occupied in the service and the distance traveled. Account verified by the party and certified by you should be reported to this office for payment. When there is no pressing emergency for the appointment of an agent, you will refer the facts to this office for consideration and await instructions.

11th. In returns to this office of sales of timber you will be careful to designate the places of seizure, the quantity and kind of timber, whether in logs or manufactured, the price per foot, and the names and residences of purchasers, and cause the same to be verified by a certificate from the party making the seizure and sale.

12th. You are directed to make a report at the end of each quarter. The first to be rendered on the first of April next, of the proceedings of your office, pursuant to these instructions, and showing the operations of this system as preventative means; also the number of acres entered by trespassers through its constraining influence. You are requested to acknowledge the receipt of this, and advise me of such pre-
47 liminary steps as you may take with a view to a compliance with the foregoing instructions.

Very respectfully, your obedient servant,

THOMAS A. HENDRICKS,
Commissioner.

REGISTER and RECEIVER.

DEPARTMENT OF THE INTERIOR,
General Land Office, Nov. 4, 1870.

REGISTER and RECEIVER,
Salt Lake City, Utah T'y:

GENTLEMEN: In reply to your letter of the 12th ult., I enclose herewith a copy of our circular of the 24th December, 1855, containing general instructions to the register and receiver of the district land offices for the protection of the public timber in their respective districts. There is no authority of law to permit any one to cut timber from the public lands for the purposes of speculation or sale. Parties who have made settlements under the pre-emption and homestead laws, are entitled to cut and use the timber on the lands embraced in their settlements to the extent necessary for domestic purposes, for clearing, building, fencing, fuel, etc., but not for sale, until, in the former case, they have proved up and entered the land (p. 38, Record), or, in the latter, after five years' continuous settlement and cultivation, have made the proof as required by law, and obtained their final certificates. You will discharge with energy the duty devolved upon you by the enclosed circular, having due regard, however, to the rights of homestead and pre-emption settlers, and to the circumstances of the community requiring a supply of timber for mining, manufacturing, and other business pursuits. In cases where timber may be cut from the public lands, and extenuating circumstances exist, you are authorized to compromise with the parties committing the trespass, on their paying all expenses incurred and a reasonable stumpage, to be fixed by you according to the condition of the market, but not to fall below the minimum rate of $2.50 per M feet. When objection is made to the rate fixed, under this rule, the matter may be submitted to the judges of the supreme court of the Territory, in which case you will be governed by their decision as to the stumpage to be exacted. In cases where no compromise is made, you will seize the timber cut on the public lands, wherever found and identified on sufficient (p. 39, Record) proof, and sell the same, after due notice, at public auction to the highest bidder, for cash, furnishing the names of the trespassers and the witnesses, by whom the offence can be established, to the district attorney, in order that if deemed expedient he may proceed against the trespassers according to law. You will report to this office the cases acted upon, describing in each the public land from which the timber was cut, the quantity of timber, amount of stumpage paid; and, when submitted to the court, that fact will be stated with the decision rendered. All moneys collected, either on account of timber sold or stumpage in compromised cases, you will deposit without abatement with the nearest United States depository to the credit of the judiciary fund, taking triplicate certificates of deposit therefor, the original of which you will send to the Secretary of the Treasury, the duplicate to this office, and retain the triplicate. And you will submit an account showing all receipts and expenses on account of the timber business to this office for adjustment.

48

I return herewith the paper you enclosed.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

49 DEPARTMENT OF THE INTERIOR,
General Land Office, Washington, D. C., July 8th, 1874.

REGISTER and RECEIVER,
Salt Lake City, Utah Territory:

GENTLEMEN: In reply to your letter of the 26th ult., I have to state that in cases where it comes to your knowledge that timber has been cut or removed from the public lands in your district, and it becomes necessary to seize and dispose of the timber according to the 8th section of the circular of December 24, 1855, you have only to send a deputy, who, under your instructions, will take charge of and hold it until it can be sold as therein provided for, and at the same time ascertain who are the trespassers and all the facts of the case. If the matter should be compromised, as your instructions provide may be done in certain circumstances, the timber may be released on the party paying expenses incurred and stumpage for the timber taken. In case a prosecution be necessary, an affidavit by a credible witness to the trespass of cutting or removing timber off the public (p. 41, Record) land will be sufficient to cause the arrest of the party, who, upon examination before a magistrate or United States commissioner, will either be discharged (p. 42, Record) or held on bail, to appear at the next term of the United States district court. In fact the proceedings are the same as those for any other criminal offence, viz, by indictment. Whenever found necessary, you may call on the United States marshal and district attorney for assistance in bringing trespassers on the public timber to account.

Very respectfully, your obedient servant,

S. S. BURDETT,
Commissioner.

50 DEPARTMENT OF THE INTERIOR,
General Land Office, Washington, D. C., Sept. 8, 1874.

REGISTER AND RECEIVER,
Salt Lake City, Utah:

GENTLEMEN: A letter has come to hand, addressed to me by the receiver, under date of the 29th ult., in reference to a certain case of wood cut from the public lands, in which Jacob Beaman and Eli B. (p. 42, Record) Kelsey are interested. In reply, I refer you to the circular of December 24, 1855, from which you will see that the duty of protecting timber in your district is devolved upon you jointly. In all your proceedings as timber agents, it is necessary that you shall act together, and not separately. In every case where you (p. 43, Record) find that timber has been cut from the public lands in your district without authority, it is your duty to cause it to be seized and held as public property, until it can be sold at public auction to the highest bidder, under the 8th section of that circular, and to report the case to the district attorney, if the offender be known, for prosecution under the penal act of the 2d March, 1831. If, however, you should find the case a proper one for compromising, you will not sell the timber, but will allow the party to pay all expenses incurred, and a reasonable rate of stumpage to be fixed by you, and on his doing so, you will release the timber from seizure and will (p. 43, Record) not proceed against the party under the penal act. By applying this rule in the case to which the receiver refers, all difficulty in disposing of the matter will be obviated. You will, on receipt hereof, ascertain and report to this office a reasonable rate of stumpage, which in view of the circumstances of your district, it would

be proper to adopt as the minimum rate in cases compromised as above (p. 44, Record) indicated.

Very respectfully,

S. S. BURDETT,
Commissioner.

51 DEPARTMENT OF THE INTERIOR,
General Land Office, Washington, D. C., 21st June, 1875.

REGISTER AND RECEIVER,
Salt Lake City, Utah:

GENTLEMEN: In reply to your letter of the 19th ult., I have to state that the cutting or removing of timber from the public lands of the United States, is an offence punishable by fine and imprisonment under an act of Congress of March (p. 44, Record) 2d, 1831, now section 2461, of the Revised Statutes of the United States. It is your duty, as timber agents, to protect the public timber in your land district, pursuant to instructions contained in the circular of Dec. 24, 1855, and letters from this to your office of November 4, 1870, July 8, 1874, and Sept. 8, 1874, which should be on your files. Where the circumstances justify so doing, you may settle with the parties on their paying any expenses incurred and a reasonable stumpage for the timber. But you are to regard this as a compromise (p. 45, Record), justified by existing circumstances, and not as the granting of permission to cut the timber, which is forbidden by law. You will not anticipate cases of the kind by printing blank forms, in advance, to be used therein, but any necessary papers may be made out as the cases arise.

Very respectfully,

S. S. BURDETT,
Commissioner.

52 Said plaintiff also offered and put in evidence a written appointment by said register and receiver, of Richard Greenway as timber agent for Big Cottonwood district, in said Salt Lake County, dated 18th day of July, 1876; that said Greenway accepted said appointment, and from its date acted as such timber agent, under and subject to instructions from said register and receiver. Said plaintiff called as a witness said Greenway who, being sworn, testified in substance among other things, that he acted under his said appointment as timber agent for said Big Cottonwood district; that under instructions from said register and receiver, and on or about the 6th day of September, 1876, he, the witness, seized for the United States, the lumber and logs at said mills "E" and "F," and advertised the same for sale; that on the 28th day of September, 1876, the register of said land office, said Oliver A. Patton, attended in person and sold the said lumber and logs at auction; that said plaintiff became the purchaser; that said sale was
53 made at said mills; that after said purchase said plaintiff procured one Wilson to look after said lumber, and to prevent any being taken away; that soon thereafter said plaintiff went with a team to haul away said lumber, and was prevented by said defendants from taking any away.

The plaintiff also gave testimony as to the value of the timber and lumber.

On cross-examination the witness stated, that within a distance of 15 or 16 miles, perhaps less, there were five saw-mills, besides said mills "E" & "F" mentioned in the complaint, belonging to parties other than defendant Wells, and all supplied with timber for sawing from the

adjacent government lands; that while he was timber agent he collected stumpage for said timber from the parties operating said mills monthly; that he received from defendant Wells, through his agent Bitner, on the 18th day of August, 1876, five dollars for stumpage on five thousand feet of logs, which Bitner claimed was all that was
54 cut for defendant in June or July of said year. That he told Bitner that amount of stumpage would not do, and would not pass at the land office. That he applied two or three times to said Bitner for the stumpage of timber cut afterwards by defendant Wells, on the government lands, but said Bitner put him off on account of the absence of said Wells, and neglected to pay the same. That he demanded stumpage from said Bitner at the time the five dollars was paid on other logs, which was refused.

Said plaintiff also called as a witness, Oliver A. Patton, who, being sworn, testified, in substance, among other things, that he was register during the period from May, 1875, to October, 1876, and acted during that time as timber agent of the United States, in connection with the receiver; that he directed the said seizure made by said Greenway because the defendants would not pay the stumpage demanded therefor, and afterwards made the sale to the plaintiff.

On cross-examination, the witness said that a seizure had been
55 made by witness and the receiver of logs and lumber in the possession of defendant Wells, in June 1875, which seizure was then released, under a stipulation made in a suit instituted in this court at that time, or soon thereafter, by said Wells, against said register and receiver, that said logs and lumber had not paid stumpage, and the seizure made by said Greenway was, in part, of the same property, because said Wells refused to pay stumpage thereon.

Question by def't's att'y: Didn't Mr. Wells come to see you in 1875?

Answer. Yes, sir; if you will observe the instructions. I am strictly forbidden to receive any stumpage after a seizure, and I had already seized this when Mr. Wells came to see me. I did, however, at that time, when Mr. Wells came to see me, agree, under certain conditions, a discretion which the Commissioner allowed me, to settle on certain terms, and I gave him my answer in writing.

Question by deft's att'y: Didn't you require him to bring two credible witnesses and prove how much timber he had sawed for ten years and pay you $2.50 a thousand?

Answer. I have forgotten the terms that were laid down. In my conversation with Mr. Wells he denied the right of the land officers to collect stumpage in Utah, and said the Territory of Utah had granted him the right to all the timber in that cañon.

Didn't his agent, in the fall of 1876, offer to pay stumpage?

A. Mr. Case? That must have been after the seizure. I would not have felt authorized to take stumpage after the seizure, because the defendant did not recognize the title of the government, and claimed the Mexican and Indian titles had not been extinguished, and that the Mormons owned the Territory by discovery and settlement. No stumpage was paid by defendant while I was register, except the five dollars paid by Bitner to Greenway.

No evidence was introduced on said trial tending to show that said plaintiff derived title or right of possession to the property in question otherwise than through his purchase thereof at said sale, nor that said Patton or Greenway had any other right or authority to make
57 said seizure and sale than such as they possessed as timber agents acting under the instructions aforesaid.

The defense.

Said defendants, to maintain and prove the issues on their part, introduced as a witness the defendant B. B. Bitner, who testified, in substance, among other things, that in August, 1876, as agent for defendant Wells, he had charge of the mills of said defendant Wells in Big Cottonwood Cañon called "Mill E" and "Mill F;" that no logs cut in 1876 were drawn to said "Mill E"; that there were no old logs there in 1876; that above 200,000 feet of logs were drawn to "Mill F" in 1876, from July to September 28th, by Langford; some of them—I should say the greater part of them—were old logs cut in 1875, and some were logs cut in 1876. Part of the logs cut in 1875 had been seized and branded with "U. S." stamp, and I refused to pay stumpage on them; that Richard Greenway, in August, 1876, gave witness notice that he had been appointed timber agent for said cañon, and would collect stumpage; witness gave him a statement of the timber that had been cut for
58 defendant Wells in the months of June & July, 1876, from the government land, which statement was verified by witness, & was true, showing five thousand feet cut, and which was cut merely to repair defendant's mills; that he paid the said Greenway stumpage therefor at the rate of one dollar per thousand feet; that only a small quantity was cut afterwards; that said Greenway never called for stumpage at any time after collecting stumpage for said months of June and July; that he seized, in September, 1876, the property in question without any further communication with the defendants; that when said Greenway made said seizure, witness was present and asked him why he made the seizure, the defendant being willing to pay stumpage, and witness then offered to pay the stumpage on timber cut in August, 1876, and up to the time of said seizure; that said Greenway replied he was not authorized to receive stumpage then, but was directed by the register and receiver to make the seizure. Witness further said, in substance, that when he paid the stumpage for timber cut in June and July,
59 1876, said Greenway demanded stumpage on old logs that were seized and released in 1875, which witness declined to pay, and that was all the dispute with said Greenway in respect to what stumpage should be paid.

The said defendants, further to maintain and prove the issues on their part, offered in evidence the original record in an action or suit in this court commenced by said Daniel H. Wells by filing complaint against Oliver A. Patton, M. V. C. Silva, & others, as timber agents of the United States, on the 10th day of July, 1875, consisting of complaint, stipulation, demurrer, & judgment, of which the following is a copy:

60 In the district court of the third judicial district of the Territory of Utah, Salt Lake County, ss.

DANIEL H. WELLS
vs.
OLIVER A. PATTON, V. M. C. SILVA, J. J. Hefferman, and William McKay, timber agents of the United States for the Territory of Utah.

Plaintiff complains and alleges—

That he is the owner and has possession and is entitled to possession of the following goods and chattles, namely, one hundred and seventy-

five thousand feet of lumber, more or less, being all the lumber; a lot of lath, being all the lath; twenty-five thousand feet of round timber in the mill-yard at Mill E, situate in Big Cottonwood Cañon, in said county; also about twelve thousand feet in the Temple block, so called, situate on the northerly side of South Temple street, in Salt Lake City, in said county; also sixteen thousand feet of lumber and lot of
61 lath, situate in the tithing-yard, so-called, situate on the northerly side of South Temple street, in said Salt Lake City; that said property, altogether, is of the value of six thousand dollars.

The defendant Oliver A. Patton is register, and said defendant V. M. C. Silva is receiver of the United States land office, and ex-officio timber agents of the United States for the district of lands subject to entry at the land office located at Salt Lake City, in said county; that the other said defendants are subordinate timber agents for said district, acting under appointment by and the direction of said Patton and Silva; that on the 26th day of June, 1875, and the second day of July, 1875, said defendants, under color of said office of timber agent, seized all the said property, marked it, and put it charge of a keeper to hold for the United States, but have not removed it, nor otherwise dispossessed the plaintiff than to forbid him to remove or dispose of the same; that said defendants have advertised said property for sale by publishing notice thereof in a newspaper published at Salt Lake City, called the
62 Salt Lake Daily Tribune, of which the following printed copies are copies, viz:

Notice No. 1.

UNITED STATES LAND OFFICE,
Salt Lake City, Utah Territory, June 26, 1875.

To Daniel H. Wells, of Salt Lake City, county of Salt Lake, and Territory of Utah, and to any and all other persons interested in a certain quantity of timber, being about and not exceeding two hundred thousand feet, board measure, to wit, aboue one hundred and seventy-five thousand feet of lumber and lath, about twenty-five thousand feet of round timber, which, by the authority in us vested, we have this day seized and taken possession of, in the yard at Mill E, situate in Big Cottonwood Canyon, so called, county of Salt Lake, and Territory of Utah; said seizure is made in behalf of the United States Government, in consequence of said timber having been cut upon the public domain without authority of law.

This, therefore, is to give notice to the said Wells and all other persons interested in said timber that on the 22nd day of July, A. D. 1875, at two o'clock in the afternoon of said last mentioned day, the
63 said timber will be sold by public auction to the highest bidder upon the premises where the same was seized.

Terms of sale, cash.

J. J. HEFFERMAN,
WM. McKAY,
United States Timber Agents in and for the Territory of Utah.

Notice No. 2.

UNITED STATES LAND OFFICE,
Salt Lake City, June 26, 1875.

To Daneil H. Wells, of Salt Lake City, county of Salt Lake, and Territory of Utah, and to any and all other persons interested in a certain quantity of timber, being about and not exceeding one hundred thousand feet, board measure, to wit, about thirty thousand feet of lumber, seventy thousand feet of round timber, which, by the authority in us vested, we have this day seized and taken possession of in the yard of Mill F, situate in Big Cottonwood Cañon, so called, county of Salt Lake, and Territory of Utah; said seizure is made in behalf of the United States Government, in consequence of said timber
64 having been cut upon the public domain without authority of law.

This, therefore, is to give notice to the said Wells and all other persons interested in said timber, that on the 22nd day of July, A. D. 1875, at two o'clock in the afternoon of said last-mentioned day, the said timber will be sold by public auction, to the highest bidder, upon the premises, where the same was seized.

Terms of sale, cash.

J. J. HEFFERNAN,
WM. M. McKAY,
United States Timber Agents in and for the Territory of Utah.

Notice No. 3.

UNITED STATES LAND OFFICE,
Salt Lake City, Utah Territory, July 2, 1875.

To Daniel H. Wells, esq., of Salt Lake City, county of Salt Lake, and Territory of Utah, and to any and all other persons interested in a certain quantity of timber, being about and not exceeding sixteen thousand feet, board measure, to wit, about sixteen thousand feet of lumber and lath, which, by the authority in me vested, I have this day seized and taken possession of in the tithing-yard, so-called,
65 situated on the northerly side of South Temple street, in Salt Lake City, county of Salt Lake and Territory of Utah. Said seizure is made in behalf of the United States Government, in consequence of said timber having been cut upon the public domain without authority of law.

This, therefore, is to give notice to the said Wells and all other persons interested in said timber, that on the 24th day of July, 1875, at ten o'clock in the forenoon of said last-mentioned day, the said timber will be sold by public auction to the highest bidder upon the premises where the same was seized.

Terms of sale, cash.

WM. McKAY,
United States Timber Agent in and for the Territory of Utah.

Notice No. 4.

UNITED STATES LAND OFFICE,
Salt Lake City, Utah Territory, July 2nd, 1875.

To Daniel H. Wells, of Salt Lake City, and Territory of Utah, and to any and all other persons interested in a certain quantity of timber,

being about and *and* not exceeding twelve thousand feet board
66 measure, to wit, about twelve thousand feet of lumber, which, by the authority in me vested, I hav' this day seized and taken possession of in the Temple yard, so called, situate on the northerly side of South Temple street, in Salt Lake City, county of Salt Lake, and Territory of Utah. Said seizure is made in behalf of the United States Government in consequence of said timber having been cut upon the public domain without authority of law.

This, therefore, is to give notice to the said Wells and all other persons interested in said timber, that on the 24th day of July, A. D. 1875, at two o'clock in the afternoon of said last mentioned day, the said timber will be sold by public auction to the highest bidder upon the premises where the same was seized.

Terms of sale, cash.

WM. McKAY,
United States Timber Agent in and for the Territory of Utah.

That said defendants give out and threaten to make sales according to said notices, unless they are restrained by some competent au-
67 thority; that said plaintiff is entitled to have said defendants restrained by this court, because he says that he bought said property in the form of round timber and saw logs, and paid full value therefor; that the same was not cut and removed from the public domain without authority of law; that said plaintiff owns the saw-mills in Big Cottonwood Cañon, mentioned in said notices; that they were erected ten years ago or more for the manufacture of lumber; that he expended in erection and purchase of said mills, and in making roads in said cañon, over forty thousand dollars; that when the same were built there was a population of about seventy-five thousand, and the same has steadily and rapidly increased since to near one hundred and fifty thousand in this Territory; that none of the lands therein capable of occupacy for cities and villages, or for agricultural purposes, in their natural state, have any timber on them. All the timber of the Terri-
tory grows on high mountain lands so difficult of access and so
68 sparse that the government has always treated such land as valu'less; never caused it to be surveyed, for the expense of survey would largely exceed the proceeds of sales; that none of the land from which the plaintiff's timber has been taken, in parcels of a regular survey would be salable for timber; the only benefit of such timber to the government is and has been the use of it by settlers who have pre-empted lands without timber, and the use of it by miners, and thus encouraging pre-empting and mining; that when said mills were built, and afterwards, until the building of railroads to afford transportation from abroad, there was a necessity regardless of cost to obtain building material from the wood growing on the mountains, and these mills were built to supply that want. The United States has never in the past, during the settlement of this Territory, exercised any jurisdiction in respect to the timber or waters of the Territory. These subjects being left to the Ter-
ritorial legislature, the plaintiff obtained from the county court of
69 said county, pursuant to the laws of said Territory, a grant of the privilege to work the timber in Big Cottonwood Cañon, a copy of which is hereto annexed, and marked "Copy A"; that but for the lumber obtained from these and other mills erected under like circumstances, the settlement of this Territory would have been and now would be retarded and mining embar'assed. The Land Department of the government of the United States having charge of its timber interests

has steadily refused to restrain the free use of the timber in this Territory by the inhabitants thereof, as well where the same was being removed under the local law as where it was being used without obtaining a grant from the local authorities; that all the property in question in this case was purchased and said mills built while this policy of the government continued, and this liberty freely granted, nor has the government now abandoned that policy or prohibited the cutting of timber, or in any manner modified its said former steady policy on this subject otherwise than in requiring those
70 who have or shall cut timber to make a statement thereof, and pay therefor, to timber agents, at certain specified prices, called stumpage, the quantity to be ascertained after and not before severance from the land. That in the spring of the year 1875, being requested by the then register and receiver of said land office to pay for timber manufactured into lumber at his said mills, on the claim that such timber had been taken from the public lands, the plaintiff, through his attorneys, though protesting that for the reason aforesaid he ought not to be required to pay for said timber, yet agreed with the then register and receiver to pay, and they with him to receive, in full satisfaction for said claim, the gross sum of sixty dollars; that he was then willing to pay said sum, but before it was actually paid said Patton and Silva came into said office and have declined to receive the same. That plaintiff has always, since agreeing as aforesaid, been ready and willing to pay said sum; that said seizure was made of said property without any demand of satisfaction for stumpage being made, or any
71 notice being given to plaintiff of the intention to make a seizure; that on plaintiff's hearing of such seizure he requested to be informed by said defendants what was required of him; he was answered by defendants that no settlement of charges on the property seized would be made, that no proposition would be entertained unless plaintiff would show by three credible witnesses all the lumber he had heretofore made, and offered two dollars and fifty cents per thousand feet for the whole.

Plaintiff further alleges that the value of the property seized is wholly made up from expenses incurred by him on said property. The same is true of all the lumber heretofore made at his said mills. There has been no margin of profit on account of having the timber at the prices he has paid for it; that the cost of the timber—all of which sawed by him at his mills he has purchased—and the cost of manufacture have always equaled the value of the lumber at prices at which he has sold it; that none of said timber standing on the public land had any
72 marketable value; that he is willing to come to an accounting in respect to the value of the timber standing—out of which the seized property was made—ascertained without enhancement on account of roads, mills, and other improvements made by plaintiff, and to pay the same, and he now here offers to make such payment, or to pay such other sums as to this court shall appear just. He also is willing and hereby offers to pay one dollar and twenty-five cents for as many acres as said timber was taken from, measured compactly, and merely for said timber, asking no conveyance of the land. But he insists that by reason of the facts hereinbefore stated that the United States had no title to the property seized when the seizure was made, and there was no right of seizure. He claims also on the same grounds that the said seizure is inequitable, and the claim set up by defendants unconscionable, for the plaintiff further alleges that the defendants are acting contrary to

the instructions of the Commissioner of the Land Office, at Washington, in this, to wit:

First. They are not directed to seize any property or to con-
73 tinue seizure for enforcement of the payment of stumpage, or compensation for other timber not seized.

Second. They are directed to proceed in the discharge of their duties as timber agents, having due regard to the rights of homestead and pre-emption settlers, and to the circumstances of the community, requiring a supply of timber for mining, manufacturing, and other business pursuits.

And said defendants are proceeding in making said seizure, and in said proposed sale, and in said unscionable terms exacted as a condition of forbearing, in utter disregard of all said considerations, and hence in disregard of the instructions of their superior, the Commissioner of the General Land Office.

Wherefore the plaintiff asks relief as follows: A temporary injunction staying the sale of said property, under said notices or any other, and to desist from all interference with said property pending this suit, by defendants and their servants, and also perpetual injunction against any other seizure and sale of said property, on plaintiff making such compensation therefor as this court shall find to be just and equitable,

which he here offers to pay, and he asks that the defendants
74 be decreed to pay the costs of this suit.

DANEIL H. WELLS.

SALT LAKE COUNTY, *ss:*

Daneil H. Wells, the plaintiff in the foregoing complaint, being duly sworn, says: I have heard read, and know the contents of said complaint; it is true of my own knowledge, except such matters as are therein stated on information and belief, and as to such matters I believe it to be true.

DANEIL H. WELLS.

Sworn to and subscribed before me this 7th day of July, 1875.
[NOTARIAL SEAL.] JULIA K. SUTHERLAND,
Notary Public.

Said complaint had endorsed thereon words and figures of which the following is a copy, to wit: Third district court, Territory of Utah,
75 Daniel H. Wells vs. Oliver A. Patton et al.; complaint. Filed July 10th, 1875. Edw'd B. McKean, clerk, by Willis P. McBride, deputy clerk. Sutherland & Bates, pl'ff's atty's.

Copy A.

Notice to the public.

In pursuance of law authorizing the county court to have the control of roads and all timber, and to grant mill-sites, and to exercise such powers as in their judgement shall best preserve the timber and subserve the interests of the settlements in the distribution of water, &c., the county court of Salt Lake County, consisting of Elias Smith, judge, Reuben Miller, and Isaac Stewart, selectmen, made the following order upon the petition of D. H. Wells: Tenamorz Little, Seymore and Legran de Young, and Richard Maxfield, assignees of Joseph Young, sen., for the exclusive right and control of the cañon known as Big Cotton-

76 wood Cañon, in Salt Lake County. The court made the following order, to wit: In consideration of the large amount of money and means already expended and to be expended in the future in making roads and bridges, and in the erection of mills and machinery, and in keeping roads in said cañon, etc., etc., he texclusive right and control of said cañon is granted to D. H. Wells, F. Little, Seymore, & Legrang Young, and Richard Maxfield, their heirs and assigns, from the mouth of said cañon to the summit on the east, and to the summit on the south, and to the summit on the north, together with all its tributaries and side cañons, including the saw-timber and right of water, provided always that the firewood and fence poles and house logs shall at all times be free to the public, with this condition: that all persons getting any of the articles mentioned in this proviso shall not have the right to take for such uses that which may be deemed by the said grantees suitable for saw-timber; provided further, that the county court shall forever have the right of timber for public uses for highways, bridges, etc., etc. And that
77 the said D. H. Wells, Tenamorz Little, Seymore and Legrand Young, and Richard Maxfield, in consideration of the foregoing privilege be, and they are hereby, required to make or cause to be made as good sufficient wagon-road up said cañon to as near the summit, on the east, as may be practicable, and to make the same to the acceptance of the selectmen and keep the same in good repair in the season of travel; and they shall have the right to charge 75 cts. for each load hauled out on said road with single teams, one dollar and fifty ($1.50) for double teams, and fifty cents (50c) for each additional span of animals, excepting the months of January, February, and March. All grants heretofore made by this court to Joseph Young, sen., to be considered embodied in this, and consequently all rights and* *and* privileges heretofore granted and not embraced herein are void.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, the undersigned, clerk of the county court of Salt Lake County,
78 in the Territory aforesaid, do hereby certify that the within and foregoing is a true and correct transcript of the order made by the county court on the 6th day of March, 1867, granting certain privileges to Daniel H. Wells, F. Little, Seymour and Legrande Young, and Richard Maxfield, in Big Cottonwood Cañon.

In testimony whereof I hereunto set my hand and affix the seal of said county this 24th day of June, A. D. 1871.

[SEAL.] E. W. EAST,
County Clerk.

Stipulation.

In the district court for the third judicial district of the Territory of Utah.

DANIEL H. WELLS
vs.
OLIVER A. PATTON, V. M. C. SILVA, J. J. Hefferman, & William McKay, timber agents of the United States for the Territory of Utah.

It is hereby stipulated by said parties as follows: In consideration of the bond to be executed by said plaintiff as below stated and his stipu-

lation herein, said defendants hereby release the property from
79 seizure mentioned in the complaint filed in this action, and will discontinue the publication of the notice of sale thereof and will not hereafter meddle with said property or interfere with plaintiff's use thereof for his own benefit; said plaintiff in consideration of the above hereby agrees that he will not discontinue this suit without the defendants' consent, but will prosecute the same with diligence to final judgment and will now give bond with sufficient surity to pay such sum as he shall be adjudged to pay by final judgment on the merits of this action. The plaintiff also agrees to advance the money to pay the costs of the seizure mentioned in the complaint and all the costs connected therewith, including advertising, and if the plaintiff shall not be found liable to pay such costs and charges, so paid by such advance, the money so paid shall be deducted from the amount otherwise awarded if anything against him by such final judgment.

SUTHERLAND & BATES,
MARSHALL & ROYLE & HEMINGRAY,
Att'ys for Def'ts.

Rec'd of Daniel H. Wells three hundred and twelve dollars for the expenses of seizure mentioned in the last paragraph of the fore-
80 going stipulation

Salt Lake City, July 10, 1875.
MARSHALL & ROYLE & HEMINGRAY,
Att'ys for Def'ts.

Said stipulation had endorsed thereon words & figures of which the following is a copy: Wells vs. Patton. 1861. Stipulation. Filed July 10, 1875. Edw'd McKean, clerk, by Willis P. McBride, deputy clerk.

Third district court.

TERRITORY OF UTAH,
Salt Lake County, ss:

In the district court in & for said district and Territory.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON & AL., DEFENDANTS. } Demur'er.

And now come the defendants and demur to the complaint herein because—

I. This court has no jurisdiction of the persons of the said defendants.
II. This court has no jurisdiction of the subject of the said action.
81 III. Said complaint does not state facts sufficient to constitute a cause of action.

J. C. HEMINGRAY,
THOMAS MARSHALL.
Att'ys for Defendants.

Said demur'er had endorsed thereon words and figures of which the following is a copy: 1961. 3rd district court, Utah. Daniel H. Wells, plaintiff, vs. Oliver A. Patton and als., defendants. Demur'er to complaint. A copy duly served this 16 day of August, 1875. Sutherland

& Bates, att'ys for pl'ff. Filed August 17, 1875. Edw'd B. M'Kean, clerk, by Willis P. McBride, deputy clerk. Hemingray & Marshall, def'ts' att'ys.

Judgment on demur'er.—July 12, 1876.

DANIEL H. WELLS, PL'FF,
vs.
OLIVER A. PATTON ET AL., DEF'TS. } No. 1961.

This cause coming on to be heard on the complaint and demur'er thereto, after argument by counsel, J. C. Hemingray, for defend-
82 ants, and J. G. Sutherland for the plaintiff, and the court being fully advised in the premeses, the said demur'er is now here sustained and said complaint is now by the court dismissed.

The said defendants, by their counsel, at the same time offering to show in connection with said record that a large part of the property in controversy in this suit is the same property which was described in the said complaint filed on the 10th day of July, 1875, and the subject of the relief therein prayed for; that the said Wells paid the costs and expenses, and gave the bond required by the stipulation made and filed in said suit; which money and bond was received by the defendants therein on the 10th day of July, 1875, and that thereupon the property which was the subject of said suit was released and redelivered by the defendants in said suit to said Wells. To the introduction of said record, and the other evidence so offered to be introduced, said plaintiff objected on the ground that the said record and other evidence so offered was immat*e*real and irrelevant; whereupon the said district court
83 decided and ruled that the said objection was well taken, and that said record and offered evidence was not admiss*a*ble and sh'uld not be received. To which ruling and decision the said defendants, by their counsel, then and there excepted. The said defendants, to further maintain and prove the said issues on their part, offered in evidence the original record in a certain action commenced by said Daneil H. Wells, as plaintiff, September 16th, 1876, in this court, against Oliver A. Patton and Richard Greenway, defendants, which record consisted of pleading, process, and proceedings, of which the following is a copy, that is to say:

Complaint.

In the district court for the third judicial district of the Territory of Utah.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

SALT LAKE COUNTY, *ss:*
84 The plaintiff complains and alleges—

I. That, at the time hereinafter mentioned, the plaintiff was lawfully possess d of certain goods and chatt*l*es, then and there and ever since the property of the plaintiff, consisting of the pine lumber and lath near to and on the north side of "Mill E," in Big Cottonwood

cañon, in said county, being forty thousand feet of lumber and fifty thousand lath; also the pine lumber near to and on the north side of "Mill F," in said cañon, being eighty thousand feet, and all made from logs drawn by Archy Livingston; also two hundred thousand laths at said last-mentioned mill, and one hundred thousand feet of pine logs, in the center of the yard of said "Mill F," of the value of four thousand five hundred and fifty dollars.

II. That on the fifth day of September, 1876, at Big Cottonwood cañon aforesaid, where said property is above stated to be, in said county, the defendants wrongfully took said goods and chattles from the plaintiff's possession, and still unjustly detain the same to the damage of the plaintiff five hundred dollars; wherefore the plaintiff demands judgment against the defendants for the recovery of the possession of said goods and chattles, or for the sum of four thousand
85 five hundred and fifty dollars, his damages, as well as the costs of this action.

J. G. SUTHERLAND,
Plaintiff's Attorney.

SALT LAKE COUNTY, *ss:*

Breneman B. Bitner, being duly sworn, says: I have heard read the foregoing complaint and know the contents thereof; said complaint is true, of my own knowledge. I make this affidavit instead of the plaintiff, because I know the facts, and the plaintiff is absent from Salt Lake County, where his attorney in this action resides.

BRENEMAN B. BITNER.

Sworn to and subscribed this sixteenth day of September, A. D. 1876, before me.

[N. SEAL.] WM. McKAY,
Notary Public.

Said complaint was endorsed as follows: District court 3d judicial district, Territory of Utah. Daniel H. Wells vs. Oliver A. Patton and als. Complaint. Filed September 16th, 1876. C. S. Hill, clerk. Issued Sept. 16, 1876. J. G. Sutherland, pl'ff's att'y.

86 In the district court in and for the third judicial district of Utah Territory, county of Salt Lake.

DANEIL A. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

The people of the United States, in the Territory of Utah, send greeting to Oliver A. Patton and Richard Greenway, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain possession and delivery of the

following-described goods and chattles: The pine lumber & lath near to and on the north side of "Mill E," in Big Cottonwood cañon, Salt Lake County, being forty thousand feet of lumber and fifty thousand lath; also the pine lumber near to and on the north side of "Mill F," in said cañon, being eighty thousand feet; also two hundred thousand lath and one hundred thousand feet of pine logs, in the center of the yard of said *of said* "Mill F," of the value of $4,530.00, of the said value, if possession and delivery of said goods and chattles cannot be had, and $500.00 damages, together with costs of this action.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. Michael Shaffer, judge, and the seal of the district court of the third judicial district, in and for the Territory of Utah, this 16th day of September, in the year of our Lord one thousand eight hundred and seventy-six.

C. S. HILL, *Clerk*,
By , *Deputy Clerk*.

87 SHERIFF'S OFFICE, S. L. Co., U. T.,
Salt Lake City, Sept. 21st, 1876.

I, Theo. McKean, sheriff Salt Lake County, do hereby certify that I did, on the 18th day of Sept., 1876, at S. L. Co., U. T., duly serve the within summons upon Richard Greenway, and on the 19th day of Sept., 1876, did duly serve the same on Oliver A. Patton, at the aforesaid county, defendants, by leaving with each of them a certified copy of the complaint, with a certified copy of the within summons.

THEO. McKEAN,
Sheriff S. L. Co., U. T.

Fees, $4.00.

(Indorsed:) No. 2716. District court, third judicial district, county of Salt Lake. Daniel H. Wells, plaintiff, against Oliver A. Patton et al., defendant'. Summons. J. G. Sutherland, plaintiff's attorney. Filed on return, Sept. 27, 1876. C. S. Hill, clerk, by , deputy clerk.

88 *Affidavit on claim and delivery of personal property.*

In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY,
defendants.

TERRITORY OF UTAH,
County of Salt Lake, ss:

Breneman B. Bitner, being duly sworn, says: He is agent for the plaintiff in the above-entitled action; that the said plaintiff is the owner of and now lawfully entitled to the possession of the following described personal property, to wit: The pine lumber and lath near to and on the north side of "Mill E," in Big Cottonwood Cañon, in said county, being 40 thousand feet of lumber & 50 thousand lath also; the pine lumber near to and on the north side of "Mill F," in said cañon, being 80 thousand feet, and all made from logs drawn by Archie Liv-

ingston; also 200 thousand lath at said last mentioned mill, and 12 thousand feet of pine logs in the center of the yard of said mill F; that the said property is in the possession of and wrongfully de-
89 tained by the defendant in the said action. That the alleged cause of the detention of said property, according to this affiant's best knowledge, information and belief is the following, to wit: Said defendants fals'ly pretend that said property belongs to the United States. That the said property, or any part thereof, has not been taken for a tax assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the said plaintiff, and that the actual value of said property is four thousand five hundred and fifty dollars.

BRENEMAN B. BITNER.

Subscribed and sworn before me, this sixteenth day of September, A. D. 1876.

[SEAL.] WM. McKAY,
Notary Public.

TERRITORY OF UTAH,
County of Salt Lake, ss:

The sheriff of said county is hereby ordered and required to take from the defendant named in the within entitled action the within mentioned and described personal property if the said property be found in said county.

90 Dated this sixteenth day of September, A. D. 1876.

J. G. SUTHERLAND,
Attorney for Plaintiff.

In compliance with the above order, I, on the 18th day of Sept., 1876, in Salt Lake Co., U. T., did take into my possession the property herein described, and did leave with Richard Greenway a certified copy of the within affidavit, together with a certified copy of the undertaking, and on the 19th day of Sept., 1876, left with Oliver A. Patton a certified copy of the within affidavit and undertaking.

Salt Lake City, *Sept.* 21, 1876.

THEO. McKEAN.
Sheriff Salt Lake Co., U. T.

Fees & mil'age, $14.75.

After holding the within described property five days, and the defendants having failed to avail themselves of the provisions of law for the custody of the property, I did, on the 25th day of September, 1876, deliver the same to the plaintiff.

THEO. McKEAN,
Sheriff Salt Lake Co., U. T.

(Indorsed:) No. 2716. District court, 3rd judicial district, county of Salt Lake. Daniel H. Wells, plaintiff, vs. Oliver A. Patton & als., defendants. Affidavits on claim and delivery of personal property and order of delivery. Filed Sept. 16th, A. D. 1876. C. S. Hill, clerk. J. G. Sutherland, att'y for plaintiff.

91 *Undertaking on claim & delivery of personal property.*

In the district court of the third judicial district, of the Territory of Utah, county of Salt Lake.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

Whereas it is alleged by the plaintiff in the above entitled action that the defendants in the said action have in their possession, and unjustly detain, certain personal property belonging to the said plaintiff, to the possession of which the said plaintiff is lawfully entitled, of the value of four thousand five hundred and fifty dollars; and whereas the said plaintiff being desirous of having the said personal property delivered to him, and by endorsement in writing upon the affidavit has required the sheriff to take the said property from the said defendants:

Now, therefore, we the undersigned, residents of the said Salt
92 Lake County, in consideration of the premises, and of the delivery of said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are jointly and severally bound in the sum of nine thousand one hundred dollars (being double the value of said property as stated in the affidavit) for the prosecution of the said action for the return of the said property to the said defendants if return thereof be adjudged, and for the payment to the said defendants of such sum as may, from any cause, be recovered against the said plaintiff.

Dated this sixteenth day of Sept., A. D. 1876.

WILLIAM TAYLOR. [SEAL.]
JOSEPH E. TAYLOR. [SEAL.]

TERRITORY OF UTAH,
County of Salt Lake, ss:

William Taylor and Joseph E. Taylor, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says: That he is a resident and freeholder w thin the said

Salt Lake County, and that he is worth the sum specified in the
93 said undertaking as the pen lty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

WILLIAM TAYLOR.
JOS. E. TAYLOR.

Subscribed and sworn to before me this sixteenth d.y of Se ptember, A D. 1876.

[SEAL.] WM. McKAY,
Notary Public.

(Endorsements:) No. 2716. District court, 3d judicial district, county of Salt Lake. Daneil H. Wells, plaintiff, vs. Oliver A. Patton et al., defendant'. Undertaking on claim and delivery of personal property. J. G. Southerland, attorney for plaintiff. Approved Sept. 18th, 1876. Theo. McKean, sheriff. Filed Oct. 6, 1876.

94 *Separate answer of Patton.*

In the third judicial district court of the Territory of Utah, Salt Lake County.

DANEIL H. WELLS, PL'FF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, def'ts.

Now comes Oliver A. Patton, one of the defendants in the above-entitled action, and for his separate answers to the complaint filed herein denies—

I. That said plaintiff, Daneil H. Wells, at the time mentioned in his said complaint, or at any other time, was possessed of the lumber, lath, timber, and logs, the goods and chattles in the complaint mentioned, or any part thereof, or that the same or any part thereof was the property of said plaintiff at the time mentioned in the said complaint, or at any other time.

II. The defendant denies that he wrongfully, or at all, took said goods in said complaint described from said plaintiff.

III. Defendant denies that he wrongfully, or at all, detains said goods and chattles, or any part thereof, from said plaintiff.

IV. Defendant denies that the said plaintiff has suffered dam-
95 age, by reason of the alleged detention, in the sum of five hundred dollars, or in any other sum whatever. And, for a further answer, this defendant says:

1st. That he is, and was during all the time mentioned in said complaint, the register of the United States land office at the city of Salt Lake, Utah Territory, duly commissioned and acting as such register, and that one V. M. C. Silver is, and was during all the time in the said complaint mentioned, the receiver of the United States land office aforesaid, and is, and was during all the time mentioned in the complaint, acting as such receiver, and as this defendant is informed and believes, was duly commissioned as such.

2nd. That as such register and receiver, and not otherwise, this defendant and the said receiver caused to be seized, and did seize, the said lumber, lath, timber, and logs, the goods and chattles in said complaint described, then and there acting as timber agents under the laws of the United States, and in obedience to instructions and regulations made by the Commissioner of the General Land Office, in pursuance of such laws; and that they, the said register and receiver, so seized said lumber, lath, timber, and logs, the goods and chattles aforesaid,
96 as the goods and chattles and property of the United States Government, the same having been unlawfully taken, cut, and hauled off and from the public domain of the United States Government, and belonging thereto; and defendant avers that the goods and chattles aforesaid, so seized as aforesaid, under and by virtue of the authority aforesaid, are the goods and chattles described in plaintiff's complaint, and are and were at the time aforesaid the goods, chattles, and property of the Government of the United States.

Wherefore defendant asks to be hence dismissed with his reasonable costs and charges in this behalf expended.

J. C. HEMINGRAY,
C. H. MORGAN,
Att'ys for Defendant.

TERRITORY OF UTAH,
Salt Lake County, ss:

Oliver H. Patton, being first duly sworn, deposes and says as follows: I. I am one of the defendants in the above-entitled action. I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on my information and belief, and as to those matters I believe it to be true.

97 OLIVER A. PATTON.

Subscribed & sworn to before me this 26th day of Sept., 1876.
C. S. HILL, *Clerk*,
By W. P. McBRIDE,
Deputy Clerk.

The foregoing answer was endorsed as follows: In the district court 3rd judicial district. Daneil H. Wells ag'st O. A. Patton et al. Answer of Patton. Filed Sept. 26, 1876. C. S. Hill, clerk, by W. P. McBride, deputy clerk. 2716. Service of copy acknowledged this 26 day of Sept., 1876. J. G. Sutherland, pl'ff's att'y. Hemingray & ———, per Wm McKay.

Separate answers of Greenway.

TERRITORY OF UTAH,
Third Judicial District, Salt Lake County, ss:

In the district court in and for said district and Territory.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

98 Now comes Richard Greenway, one of the defendants in the above entitled action, and for his separate answer to the complaint filed herein denies:

1st. That said plaintiff, Daniel H. Wells, at the time mentioned in said complaint, or at any other time, was possessed of the lumber, lath, timber, and logs, the goods and chattles in the complaint mentioned, or any part thereof; or that the same, or any part thereof, was the property of said plaintiff at the time mentioned in the said complaint, or at any other time.

2nd. Denies that he wrongfully or at all took said goods in said complaint described from said plaintiff.

3rd. Denies that he wrongfully or at all detains said goods and chattles, or any part thereof, from said plaintiff.

4th. Denies that the said plaintiff has suffered damage by reason of the alleged detention in the sum of five hundred dollars, or in any other sum whatever.

And for a further answer this defendant says that he is a deputy United States timber agent, duly appointed by the register and receiver of the land office of the United States located at Salt Lake City,
99 Utah Territory; that as such deputy, and acting solely under the instructions of his said principals, and not otherwise, he seized the lumber, lath, timber, and logs in the said complaint mentioned.

That said lumber, lath, timber, and logs were made and manufactured from trees cut from the public lands of the United States by the said plaintiff without any authority whatever; that said lumber, lath, timber, and logs are the property of the United States and subject to seizure by the timber agents of the United States; that the said lumber, lath, timber, and logs, so by this defendant seized as aforesaid, are the same as in plaintiff's said complaint described, and are the property of the United States as aforesaid.

Wherefore this defendant prays judgement that he be hence dismissed with his costs.

J. C. HEMINGRAY,
C. H. MORGAN,
Att'ys for Def't.

TERRITORY OF UTAH,
Salt Lake County, ss:

Richard Greenway, being first duly sworn, deposes and says as follows: I am one of the defendants in the above-entitled action. 100 I have read the *the* foregoing answer and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to this matter I believe it to be true.

R. GREENWAY.

Subscribed and sworn to before me this 27th day of Sept., 1876.
E. T. SPRAGUE,
Clerk of the Supreme Court Utah Territory.

The foregoing answer was endorsed as follows: 3d district court. Daneil H. Wells vs. O. A. Patton et al. Answer of Greenway.

A copy of this answer served this 27th day of Sept., 1876.
J. G. SUTHERLAND,
By WM. McKAY.

Filed Sept. 27, 1876.

C. S. HILL, *Clerk.*

That the said defendants in offering as evidence the said record, offered to prove in connection therewith that the property in question in the action evidenced by said record, and the property in controversy in this action, now on trial, are the same and wholly identical to the admission of said record and evidence so offered; the plaintiff, by his counsel, then and there objected on the ground that the same 101 was immaterial and irrelevant; whereupon the said district court ruled and decided that the said objection was well taken; that the United States was not a party and could not be sued either directly or indirectly; and that said record and testimony be not received. To which ruling and decision of said court the said defendants, by their counsel, then and there excepted. The said defendants further to maintain and prove the issues on their part, offered in evidences the original record of this court in a certain other suit or action concerning the whole property now in question, commenced therein Sept. 27th, 1876, by Daneil H. Wells, as plaintiff, against Oliver A. Patton and Richard Greenway, defendants, consisting of pleadings, process, and proceedings shown by said record, of which the following is a copy, to wit:

In the district court for the third judicial district of the Territory of Utah, Salt Lake County.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

102 The plaintiff complains & alleges—

I. That at the time hereinafter mentioned the plaintiff was lawfully possessed of certain goods & chattels, then and ever since the property of the plaintiff, consisting of the pine lumber and lath near to, and on the north side of Mill E, in Big Cottonwood Cañon, in said county, being forty thousand feet of lumber and fifty thousand lath; also the pine lumber near to and on the north side of Mill F, in said cañon, being eighty thousand feet and two hundred thousand lath; also one hundred thousand feet of pine logs in the center of the yard of said Mill F, all made from logs which said plaintiff purchased from Archie Livingston, & which said Livingston delivered to said plaintiff for value.

II. That on the 5th day of September, 1876, at Big Cottonwood Cañon aforesaid, where said property is above stated to be, in said county, the defendants wrongfully took said goods & chattels from the plaintiff's possession, and unjustly, wrongfully, and without good
103 cause, detained the same for a long time, to wit, for the space of thirteen days, to the great damage and annoyance of said plaintiff. That on the 16th day of September, 1876, said plaintiff filed his complaint in said court, against said defendants, for the recovery of said goods & chattels, and one Breneman B. Bitner, agent of said plaintiff, in the absence of said plaintiff from this county, made oath to, and subscribed his name to an affidavit, which was filed in said action, setting forth, among other things, the following, that is to say, that said plaintiff was the owner of, and lawfully entitled to, the possession of the property specified in said affidavit, and which said property is the same herein specified; that said property was then in possession of, and wrongfully obtained by, the defendants in the said action; that the alleged cause of the detention of said property, according to affiant's best knowledge, information, and belief, was that said defendants falsely pretended that said property belonged to the United States, and
104 that said property, nor any part thereof, had not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or on an attachment against the property of the said plaintiff, and that the actual value of the said property was four thousand five hundred & fifty dollars. That on the same day, to wit, September 16th, 1876, this plaintiff entered into an undertaking, with two good, sufficient sureties, in the sum of nine thousand one hundred dollars, being double the amount of said property as stated in said affidavit, conditioned for the prosecution of the said action, for the return of the property aforesaid to said defendant, if return thereof be adjudged, & for the payment to said defendant of such a sum as may, from any cause, be recovered against said plaintiff in said action. That upon the filing of said complaint, as aforesaid, summons was thereupon issued and placed in the hands of the sheriff of the county of Salt Lake,
105 with directions to serve the same personally upon the defendants, together with copy of said affidavit, notice, and undertak-

ing, and personal service of the same were duly made upon said defendants by said sheriff, on the 18th day of September, 1876, as plaintiff is informed and believes. That on the said 18th day of September, 1876, at Big Cottonwood Cañon aforesaid, in the county aforesaid, said property being then and there in possession of said defendants as aforesaid, the said sheriff took said property into his custody, and held the same until the expiration of five days after the taking & serving of notice to the defendants; and the said defendants not having excepted to the sufficiency of the sureties of said plaintiff, nor signed the return of said property within the time required by statute, the said property was delivered to the plaintiff by said sheriff.

III. That the defendants have severally made answer to the
106 complaint filed in said action and notorial standing; said action is now pending in said court, wherein the title to the property *to the property* may be tried and the rights of the parties settled. These defendants, as this plaintiff is informed and believes, threatened to sell, and intend to sell, said property in the 28th day of September, 1876, the selling of which property will produce great and irreparable injury to said plaintiff, and will render a judgement in said action, if in favor of said plaintiff, ineffectual in this, that said defendants, and each of them, are, as plaintiff is informed and believes, insolvent, and could not, if said property is sold as threatened by said defendants, respond to judgement against them, or either of them, for damages.

Plaintiff denies the allegation in the answer of said Oliver A. Patton, that he, as register, and V. M. C. Silva, as receiver of the United
107 States land office at Salt Lake City, and as such register and receiver, and not otherwise, they seized the said goods and chattels, then and there acting as timber agents of the United States, and in obedience to instruction and regulations made by the Commissioner of the General Land Office in pursuance of said laws, and that they took the said goods & chattels as the property of the United States Government, and that the same were the property of the United States Government.

And the plaintiff denies the allegations in the answer of the said defendant, Richard Greenway, that as deputy United States timber agent, & not otherwise, he seized the goods & chattels aforesaid, and that the same were manufactured from trees cut from the public lands of the United States without authority, and that the said goods and chattels were the property of the United States, and denies that the same were subject seizure by the timber agents of the United States.

108 And the said plaintiff alleges that the said seizure, made as aforesaid was wrongful and illegal; that the said Patton as register, and the said Silva as receiver, and said Greenway as timber agent, had no authority under the laws of the United States to make the same, nor had they, or either of them, any authority to make such seizure under the instructions or regulations of the Commissioner of the General Land Office, or at all.

Wherefore plaintiff demands judgment against said defendants, & pray' that an injunction be allowed restraining said defendants, and each of them, their agents or employees, from selling, disposing of, transferring, incumbering, removing, or in any manner interfering with said property or any part thereof, and for such other or further relief as this court may think proper to grant.

WOODS & GEE,
Pl'ff's Att'ys.

109 TERRITORY OF UTAH,
Salt Lake County, ss:

Daniel H. Wells, being first duly sworn, says I am the plaintiff in the above-entitled action. I have heard read the foregoing complaint, and know its contents; said complaint is true of my own knowledge, except the matters therein stated on information and belief, & as to those matters I believe it to be true.

DANIEL H. WELLS.

Sworn to and subscribed before me this 27th day of Sept., 1876.
[SEAL.] WM. McKAY,
Notary Public.

TERRITORY OF UTAH,
Salt Lake County, ss:

The clerk of the 3d dist. court of the Territory will issue a temporary injunction, as prayed above, upon the complainant filing the bond for twenty-five hundred dollars, herewith presented and marked.

Approved, Sept. 27, 1876.

M. SCHAEFFER,
Judge of 3d Dist. Court.

110 (Indorsed:) In dist. court 3d judicial dist., Utah Territory. D. H. Wells vs. Oliver A. Patton et al. Complaint filed Sept. 27th, 1876. C. S. Hill, clerk.

Bond.

In the district court of the third judicial district of Utah Territory, Salt Lake County.

DANIEL H. WELLS, PL'FF,
vs.
OLIVER A. PATTON AND RICHARD GREENway, def'ts.

Know all men by these presents that we, Daniel H. Wells, as principal, and Henry Arnold, Wm. Harrison, Alex. McRea, sureties, are held and firmly bound unto Oliver A. Patton and Richard Greenway in the sum of twenty-five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, and assigns, firmly by these presents. Sealed with our seal & dated this
111 27th day of Sept., A. D. 1876. Conditioned, that whereas an order granting an injunction in the foregoing entitled cause has this day been made by the judge of said court based upon the complaint and supplemental complaint in said action, and to run against said defendants, their agents, servants, employees, upon filing a bond in the sum of $2,500.00: Now, if said plaintiff shall well and truly pay to the said defendants, or either of them, such damages, not exceeding the above specified amount of twenty-five hundred dollars, as the said defendants, or either of them, may sustain by reason of such injunction, if the court finally decide that the plaintiff was not entitled to the said writ of injunction then this obligation is to be void, otherwise to be and remain of full force & virtue.

DANIEL H. WELLS. [SEAL.]
HENRY ARNOLD. [SEAL.]
WILLIAM HARRISON. [SEAL.]
ALEXANDER McREA. [SEAL.]

112 TERRITORY OF UTAH,
Salt Lake County, ss:

Henry Arnold, William Harrison, & Alex. McRea, being duly sworn, each on his oath says: that he is one of the sureties herein, a resident and householder of said county, and worth the sum of twenty-five hundred dollars specified in the foregoing undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

HENRY ARNOLD.
WILLIAM HARRISON.
ALEXANDER McREA.

Subscribed & sworn to before me Sep. 27th, 1876.

C. S. HILL, *Clerk.*

Approved Sept. 27th, 1876.

M. SCHAEFFER, *Judge.*

113 (Indorsed:) Daniel H. Wells vs. O. A. Patton et al. Undertaking filed Sep. 27th, 1876. C. S. Hill, clerk.

Injunction.

In the district court of the third judicial district, Territory of Utah, county of Salt Lake.

DANIEL H. WELLS
vs.
OLIVER A. PATTON, RICHARD GREENWAY.

The people of the Territory of Utah to Oliver A. Patton & Richard Greenway send greeting:

The above-named plaintiff having filed his complaint & affidavit in the district court of the 3rd judicial district for the Territory of Utah against the above-named defendants, praying for an injunction against said defendants, requiring them to refrain from certain acts in said com-
114 plaint and thereafter more particularly mentioned on reading the said complaint & affidavit in this action, duly verified by Daniel H. Wells, and it satisfactorily appearing to the judge of our said court thereupon that it is a proper cause for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given, we therefore, in consideration thereof and of the particular matters in said complaint set forth, do strictly command you and each of you, your and each of your servants, agents, employees, and all persons acting under the control, authority, or direction of you or either of you, from selling, or in any manner interfering with the lumber, logs, lath, and timber, in annexed complaint described and in dispute, without the further order of this court. Witness Hon. Michail Schaffer, judge of the third judicial district for the Territory of Utah, and the seal of said court, this 27th day of September, 1876.

[3RD DIST. COURT SEAL.] C. S. HILL, *Clerk.*

115 TERRITORY OF UTAH,
County of Salt Lake, ss:

I hereby certify that I served the above order of injunction in Salt Lake County, Utah Territory, on the 28th day of September, A. D. 1876, at 7 o'clock a. m., on the defendants therein named personally, to wit,

Oliver A. Patton and Richard Greenway, by delivering to each a certified copy of the above order of injunction.

Dated Sept. 29, 1876.

WILLIAM NELSON,
U. S. Marshal,
By A. K. SMITH, *Deputy.*

Fees, $29.50.

In the district court of the third judicial dist., Salt Lake County. Daniel H. Wells vs. Oliver A. Patton and Richard Greenway. Writ of injunction. Filed Sept. 29, 1876. C. S. Hill.

116 In the district court in and for the third judicial district of Utah Territory, county of Salt Lake.

DANIEL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

The people of the United States, in the Territory of Utah, send greeting, to Oliver A. Patton and Richard Greenway, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to restrain and enjoin you, the said defendants, each of you, your and each of your servants, agents, and employees, from seizing, selling, or in any manner interfering with certain lumber, lath, and logs, more particularly described in the complaint on file herein, to wit, certain pine lumber and lath, on north side of mill E, in Big Cottonwood Cañon, being 40 thousand ft. of lumber and 50,000 lath; also, 80,000 ft. pine lumber near mill F, 200,000 lath and 100,000 ft. of logs in and about said mill F, and for costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. Jas. B. McKean, judge, and the seal of the district court of the third judicial district, in and for the Territory of Utah, this 27th day of September, in the year of our Lord one thousand eight hundred and seventy-six.

C. S. HILL, *Clerk,*
By , *Deputy Clerk.*

117 (Indorsed:) No. 2729. District court, third judicial district, county of Salt Lake. Daniel H. Wells, plaintiff, against Oliver A. Patton et al., defendants. Summons. Woods and Gee, plaintiff's attorney'. Filed on return Sept. 29th, 1876. C. S. Hill, clerk, by , deputy clerk.

U. S. MARSHAL'S OFFICE.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I hereby certify that I have served the within summons in the county of Salt Lake, and Territory of Utah, on the 28th day of Sept., 1876, on the within named defendants, to wit, Oliver A. Patton and Richard Greenway, by delivering to Oliver A. Patton personally a true copy of the within summons, with a certified copy of the complaint attached thereto, and by delivery to Richard Greenway a true copy of the within summons.

Dated at Salt Lake City, Sept. 29, 1876.

WILLIAM NELSON,
U. S. Marshal,
By A. K. SMITH, *Deputy.*

Fees, $20.50.

118 In the district court of the third judicial district of Utah Territory, Salt Lake County.

DANIEL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

TERRITORY OF UTAH,
Salt Lake County, ss:

Daniel H. Wells, being duly sworn, on his oath says that he is the plaintiff herein; that on the 27th day of September, 1876, a suit for an injunction was commenced in this court, and that afterwards, on the same day, such proceedings were had in said suit as that an injunction ordered by the judge of this court was issued, and under the seal of this court tested by the clerk thereof, and commanding, enjoining, and restraining the said defendants and each of them, their servants, agents, or employees or either of them, from selling or in any manner interfering with certain lumber, lath, and logs in Big Cottonwood Cañon in said county, in said writ and the complaint in said suit more particularly described; that said writ was placed in the hands of the
119 proper officer of this court for service, and that afterwards, on the 28th day of September, 1876, at the hour of 7 o'clock a. m. of said day, the said writ of injunction was duly, regularly, and personally served upon each of said defendants by Wm. Nelson, United States marshal of said Territory, by A. K. Smith, the duly appointed and qualified deputy of said marshal, and affiant refers to said writ and the return thereof as part of this affidavit; that notwithstanding the mandate of said writ and the service thereof as aforesaid, the said defendants Oliver A. Patton and Richard Greenway, and each of them, contemptuously and illegally proceeded to sell, and did in violation of said writ after the service thereof, and on the same day, make a pretended sale of the goods and chattels in said writ mentioned and described, forcibly and wrongfully, and the said Oliver A. Patton, defendant, did by language (as affiant is informed and believes) express his intention to disregard the mandates of this court, and did make the pretended sale aforesaid in disobedience of said injunction, and as a further aggravation of the said alleged contempt of court affiant alleges, upon information and belief, that said Oliver A. Patton, defendant as aforesaid,

120 made a guarantee of title to the purchaser at said pretended sale.

Wherefore affiant prays that a warrant of attachment may issue to bring the said Oliver A. Patton and Richard Greenway before this court, then and there to answer to said alleged contempt.

DANIEL H. WELLS.

Subscribed and sworn to before me Sept. 28, 1876.

C. S. HILL, *Clerk.*

(Indorsed:) 2729. Daniel H. Wells vs. Oliver A. Patton and Richard Greenway. Affidavit of Daniel H. Wells. Filed Oct. 4, 1876. C. S. Hill, clerk.

121 *Answer.*

TERRITORY OF UTAH,
County of Salt Lake, ss:

In the district court in and for the third judicial district.

DANIEL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, DEFENDANTS.

The defendants in the above-entitled action, in answer to the complaint of the said plaintiff for injunction against said defendants, deny—

I. That the plaintiff, at the time mentioned in plaintiff's complaint, or at any other time, was possessed of or was entitled to the possession of the goods and chattels described in count No. I of plaintiff's complaint.

II. Deny that these defendants unlawfully, or at all, on the 5th day of September, 1876, or at any other time, in Big Cottonwood Cañon or elsewhere, took the said goods and chattels from the possession of said plaintiff and detained the same for thirteen days or any other time.

122 III. Defendants admit that on the 16th day of September, 1876, plaintiff brought an action in this court against these defendants as in plaintiff's complaint alleged, but aver on their own behalf, that said action was brought against these defendants in their individual and not in their official capacity as hereinafter set forth, and that the goods and chattles, as in plaintiff's complaint set forth, were seized by said defendant Patton and one V. M. C. Silva, who were at the time referred to in said complaint, and now are the register and receiver respectively of the land office of the United States, at Salt Lake City, Salt Lake County, Territory of Utah, and that under and by virtue of the laws of Congress and the instructions of the Commissioner of the General Land Office of the United States, they were at the time aforesaid, and now are, timber agents of the said United States, whose duty it is to protect the property and timber on the public lands of said United States, with power to appoint sub-timber agents for the purpose aforesaid; that pursuant to said power and authority in them vested they did appoint said defendant Greenway as sub-timber agent for the purposes aforesaid, and that defendant Patton as register aforesaid, and the said V. M. C. Silva as receiver aforesaid, did, as

123 timber agents aforesaid, by virtue of the power and authority aforesaid, and not otherwise, cause to be seized and did seize said lum-

ber, timber and laths as the goods, chattles and property of the United States, and not otherwise.

IV. Defendants aver that said plaintiff did not at the time mentioned in said complaint or at any other time own said goods and chattles described in said complaint, but that the same were at the time therein mentioned and at all times up to the 28th day of September, 1876, the goods, and chattles and property of the United States, and wrongfully and unlawfully cut from the public lands belonging to said United States. Defendants admit that they are not rich in ready money.

V. Defendants deny that on the 18th day of September, 1876, at Big Cottonwood Cañon or at any other time or place, while the said property was in possession of said defendants or any other person or persons, the sheriff of Salt Lake County held the said property, during the time or in the manner set forth in said complaint; nor did he, the said sheriff, deliver the said property to the plaintiff as alleged in said complaint.

124 VI. Admit that defendants have made answer to the complaint filed in the action referred to in count numbered III, in plaintiff's complaint herein, but aver that such answers were made in their individual and not official capacity.

VII. Deny that the sale of said property will produce great and irreparible or any injury to said plaintiff, or that a judgment against these defendants or either of them could not be responded to by said defendants.

VIII. Deny that the seizure made by defendants aforesaid of the property aforesaid was wrongful and illegal; but aver that they had full authority to make said seizure by virtue of the authority more fully set forth in count numbered III of this answer, to which reference is hereby specially made; wherefore defendants pray that said injunction may be dissolved and that they be hence dismissed with their reasonable costs and charges in this behalf expended.

J. C. HEMINGRAY,
C. H. MORGAN,
Att'ys for Def'ts.

TERRITORY OF UTAH,
County of Salt Lake, ss:

125 Oliver A. Patton, one of the defendants herein, being first duly sworn, deposes and says as follows:

1st. I am one of the defendants in the above entitled cause.

2nd. I have read the foregoing answer, and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on my information and belief, and as to those matters I believe it to be true.

OLIVER A. PATTON.

Subscribed and sworn to before me this 6th day of October, 1876.
C. S. HILL, *Clerk.*

(Indorsed:) 2729. 3rd dist. court, Utah. Daniel H. Wells, pl'ff, vs. Oliver A. Patton and Richard Greenway, deft's. Answer in equity. Filed Oct. 6th, 1876, C. S. Hill, clerk. Hemingray and Morgan, def't's' att'ys.

126 *Injunction.*

In the district court of the third judicial district of Utah Territory, Salt Lake County.

DANIEL H. WELLS, PL'FF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, def'ts.

Now comes the said plaintiff and moves the court to strike the paper purporting to be the answer of said defendants, filed Oct. 6, 1876, from the files in this suit, because the same was improperly filed.

I. Said defendants are proceeded against for an alleged contempt, of which they are not purged and have no right to make answer herein until said question of contempt shall be settled.

II. Said paper was filed without leave of court or of the judge of this court.

III. (Waived.) The said paper is not signed by defendants, or either of them, or by their or either of their attorneys.

WOODS AND GEE AND
DAVID COOPER,
Att'ys for Pl'ff.

Oct. 7, 1876.

127 (Indorsed:) Daneil H. Wells vs. Oliver A. Patton et al. Motion to strike. Filed Oct. 7th, 1876. C. S. Hill, clerk.

Warrant of attachment.

TERRITORY OF UTAH,
Salt Lake County:

Third district court.

DANEIL H. WELLS
vs.
OLIVER A. PATTON AND RICHARD GREENWAY.

To the United States marshal of the Territory of Utah or any of his deputies, greeting:

Whereas it is alleged upon the affidavit of Daneil H. Wells, the pl'ff in the above-entitled cause, that the defendants, Oliver A. Patton and Richard Greenway, have been guilty of a contempt of court in violating the mandate of a writ of injunction heretofore issued in this cause.

You are hereby commanded to notify and surrender the said Oli-
128 ver A. Patton and *and* Richard Greenway to be and appear be-
fore the undersigned, judge of the district court of the third judicial district of the Territory of Utah, at the Fed'ral court-house in Salt Lake City, in said Territory, on Friday, the 6th day of October, 1876, at 9 o'clock a. m., to show cause, if any they have, why they should not be treated as in contempt of the said court by violating the said mandate of the said writ of injunction, and have you then and there this writ, with a return of your doings hereon.

Witness my hand this 4th day of October, A. D. 1876.

M. SCHAEFFER,
Judge 3rd Dist. Court of the Territory of Utah.

Third district court.

TERRITORY OF UTAH,
Salt Lake County, ss:

DANEIL H. WELLS
vs.
OLIVER A. PATTON & RICHARD GREENWAY.

The defendants in the above-entitled cause do hereby waive the service and services of the summons and notice to appear and show
129 cause, &c., and enter their appearances the same as if they had been duly served with summons and notice to appear October 6th, A. D. 1876.

J. C. HEMINGRAY,
C. H. MORGAN,
Att'ys for Def'ts.

(Indorsed:) 2729. Daneil H. Wells vs. Oliver A. Patton and Richard Greenway. Summons to appear & show cause, &c. Filed Oct. 5, 1876. C. S. Hill, clerk.

In the third judicial district court Utah, Utah Territory, Salt Lake County.

DANEIL H. WELLS
vs.
OLIVER A. PATTON & RICHARD GREENWAY.

TERRITORY OF UTAH,
Salt Lake County, ss:

130 Oliver A. Patton, being duly sworn, on oath, deposes and says: He is one of the defendants in the above entitled action, and is now and *and* for more than one year last past has been register of the United States land office at Salt Lake City and County, Utah Territory; that one V. M. C. Silva is and has been more than one year last past receiver of said land office; that under and by virtue of the laws of the United States, and the instructions and regulations of the Commissioner of the General Land Office of the United States, they, as timber agents lawfully authorized thereto, caused to be seized the timber, lumber, and lath, the goods and chattles described in said complaint, as goods, chattles, and property of the United States.

Affiant further says that said property so described in said complaint and every part thereof was unlawfully cut on public lands belonging to the Government of the United States, and was at the time mentioned in said complaint, and was at all times up to the 28th day of September, A. D. 1876, the property of the said United States Government, at which time said property was sold by said defendant as register aforesaid, and the said V. M. C. Silva as receiver as aforesaid as timber agents of the government aforesaid and not otherwise.

131 Affiant further says that said plaintiff, Daniel H. Wells, did not at the time mentioned in said complaint, nor at any other time, own said goods and chattles described in said complaint, nor any part thereof, but the same were at the time aforesaid the goods, chattles, and property of the Government of the United States, and wrongfully and unlawfully cut from the public lands belonging to said government.

OLIVER A. PATTON.

Subscribed and sworn to before me this 3rd day of October, A. D. 1876.

C. S. HILL, *Clerk.*

(Indorsed:) 2729. 3d district court, Daneil H. Wells vs. Oliver A. Patton et al. Affidavit. Filed Oct. 4, 1876. C. S. Hill, clerk, by W. P. McBride, deputy clerk.

132 *Affidavit to dissolve injunction.*

In the third judi ial district court, Utah Territory, Salt Lake County.

DANIEL H. WELLS
vs.
OLIVER A. PATTON AND RICHARD GREENWAY.

Richard Greenway, being first duly sworn, deposes and says that he was duly appointed timber agent before the 5th day of September, A. D. 1876, and was, on that day and now is, acting as timber agent for the United States; that said appointment was made by Oliver A. Patton, register, and V. M. C. Silva, receiver of the United States land office at Salt Lake City, Utah Territory, on said 5th day of September, by virtue of the power in him vested, and instructions to him given by the said register and receiver befor' and on behalf of the United States, seized the timber, lumber, and lath, the goods and chattles in said plaintiff's complaint in said cause discribed, as the goods, chatt*les*, and property of the United States, the same having been cut wrongfully and unlawfully *cut* from the public lands belonging to the United States, then and there, being at the time mentioned in said complaint,
133 unlawfully in the possession of said plaintiff, Daneil H. Wells, and that in pursuance of said instructions he held possession of said property from the time of said seizure until the day of sale, to wit, the 28th day of September, 1876, by said register and receiver as such timber agents and not otherwise.

Affiant further says, that the timber, lumber, and lath, the goods and chatt*les* described in said complaint were at the time mentioned in said complaint the property of the United States, and was not the property of said plaintiff, Daneil H. Wells, and as affiant verily believes the allegations made by the said plaintiff, Daneil H. Wells, in his said complaint, of ownership and possession of the property in said complaint described, are wilfully false, and fraudulently made, with the intent to cheat and defraud the United States out of said property.

Affiant further says that in seizing and retaining said property he acted in no other capacity than as an officer of the United States, and for and on behalf of said United States under and by the appointment and instructions as aforesaid, and further this defendant saith not.

RICHARD GREENWAY.

134 Subscribed and sworn before me this 7th day of October, 1876.

C. S. HILL, *Clerk.*

(Indorsed:) 3rd dist. court. Daneil H. Wells vs. Oliver A. Patton and Richard Greenway. Aff't of Greenway. In injunction. Filed Oct. 7th, 1876. C. S. Hill, clerk.

In the third judicial district court.

UTAH TERRITORY,
Salt Lake County, ss:

DANIEL H. WELLS
vs.
OLIVER A. PATTON AND RICHARD GREENWAY.

Now comes the said defendants by Hemingray and Morgan, their attorneys, appearing for this motion only, and move the court to dissolve the injunction heretofore herein granted, and for cause show that the defendants were at the time mentioned in said complaint acting as revenue officers of the Government of the United States in the capacity of register and receiver of the land office at Salt Lake City, Utah
135 Territory, and timber agents of said government, and the property seized by them as government officers was the property of the Government of the United States.

C. H. MORGAN AND
J. C. HEMINGRAY,
Att'ys for Def'ts.

(Indorsed:) 2729. 3rd dist. court. Daneil H. Wells vs. O. A. Patton et al. Motion. Filed Oct. 5th, 1876. C. S. Hill, clerk.

In the third judicial district court.

UTAH TERRITORY,
Salt Lake County:

In the matter of the contempt of Oliver A. Patton and Richard Greenway.

Your respondents, Oliver A. Patton and Richard Greenway, in answer to the rule to show cause in the matter of contempt charged, respectfully show to the court as follows:

1st. They admit an action of replevin was commenced by
136 Daneil H. Wells against respondents in said court under the statutes of the Territory against respondents as individuals for the recovery of the property described in the complaint in said action.

2nd. Respondents allege that each of these respondents made their separate answer to said complaint, to which answers they beg leave to refer the court.

3rd. Respondents admit they were duly served with a copy of the complaint and order of the court enjoining them from selling said property as individuals against whom the writ to take said property as in replevin run.

4th. Respondents deny that they intentionally or otherwise disobeyed said order of court, and allege—

1st. That the summons commanding them to appear before said court on a day therein mentioned, as well as to refrain and cease from interfering with said property described in said complaint was tested in the name of James B. McKean, as judge of said district court, and not in the name of Michael Schaeffer who is and was at that time judge of said court.

2nd. Respondents further allege that at the time mentioned in said complaint they were acting as timber agents for the United States, and

in that capicity and not otherwise had seized the timber, lumber and lath mentioned in said complaint as the property of the United
137 States, wrongfully and unlawfully cut from the public lands of the United States and unlawfully in the possession of said Daneil H. Wells.

3rd. Respondents allege that at the time mentioned in said complaint the said Oliver A. Patton was and now is register of the United States land office at Salt Lake City, Utah Territory, and that one V. M. C. Silva was at the time aforesaid and now is receiver of said United States land office; that at and before the time mentioned in the said complaint they appointed the said Richard Greenway subtimber-agent, as they lawfully might do under the laws of the United States and instructions from the Commissioner of the General Land Office of the United States.

4th. Said respondents Oliver A. Patton and said V. M. C. Silva, as register and receiver of said land office and timber agents aforesaid, by authority of the laws of the United States and instructions from the Commissioner of the General Land Office of the United States seized said goods and chattels in said complaint mentioned as the goods, chattels and property of the United States, and gave possession
138 of the same with instructions to the said Greenway as such subtimber agent to hold possession of the same for the said United States; said timber, lumber and lath having been unlawfully cut from the public lands of the United States as aforesaid, and was then and there at the time aforesaid the property of the United States.

Respondents further say that the said Patton, as register as aforesaid, and the said Silva, as reciever aforesaid, advertized said property for sale, as they lawfully might do, and did, on the 28th day of September, 1876, sell the same by virtue of the authority in them vested as timber agents of said United States.

Respondents further say that, from the time of the seizure aforesaid they held and retained the possession of the said goods and chattles in said complaint discribed for and on behalf of the United States, and up to the time of said sale, at which time they sold and conveyed the title of the United States in and to said property to the purchaser thereof, to wit, one John Nickles.

Repondents further say that, in the seizure and sale of said property, they were acting in the line of their duty as officers of the Government
139 of the United States, and not otherwise; and that the property so seized and sold was the property of the United States, and was unlawfully cut fromt he public lands belonging to said United States, and was not then, or at any time, the property of said plaintiff, Daneil H. Wells.

Respondents further say that they had no intention or design, and now here disavow any intention or design, to disregard the order of this honorable court, but having fully and fairly stated their case to their counsel, J. C. Hemingray and C. H Morgan, attorneys of this honorable court residing in Salt Lake City, they were advised by their said counsel, after such statements, that neither State nor Territorial courts had jurisdiction to enjoin the officers of the government of the United States, such as these respondents claim to be, and are, in the discharge of their duty as such officers; and that said action brought by said Wells against them as such individuals was so brought under the laws of the Territory of Utah, and could not, therefore, interfere with them in the discharge of their said duties as such officers of the Government of the United States, as aforesaid. That in pursuance of said advice they sold said property, as hereinbefore mentioned and set forth.

140 Wherefore they, and each of them, pray to be hence dismissed by this honorable court with their costs in this behalf expended.

J. C. HEMINGRAY,
C. H. MORGAN,
Atty's for Respondents.

TERRITORY OF UTAH,
Salt Lake County, ss:

Oliver A. Patton and Richard Greenway, each being duly sworn, each for himself, and not for one another, deposes and says:

1. That he is the respondent mentioned in the foregoing answer; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of own knowledge, except as to those matters therein stated upon his information and belief, and as to those matters he believes it to be true.

OLIVER A. PATTON,
RICHARD GREENWAY.

Subscribed and sworn to before me, this 6 day of October, 1876.

C. S. HILL, *Clerk.*

141 (Indorsed :) 2729. In the matter of the contempt of Oliver A. Patton and Richard Greenway. Filed Oct. 6, 1876. C. S. Hill, Clerk.

142 *Subpœna.*

In the district court of the third judicial district of the Territory of Utah. Salt Lake County. Sept. term, A. D. 1876.

Hon. M. Schaeffer, Judge.

DANEIL H. WELLS, PLAINTIFF,
against
OLIVER A. PATTON & R. H. GREENWAY,
defendants.

The Territory of Utah, send greeting to B. B. Bitner:

We command you, that all and singular, business and excuses being laid aside, you appear and attend before the third judicial district court of the Territory of Utah, at a term of said court to be held at the court house in Salt Lake City on the 5th day of October, A. D. 1876, at 9 o'clock a. m., then and there to testify in the above entitled action now pending in said district court, on the part of the pl'ff, and disobedience will be punished as a contempt by the said court.

Witness Hon. M. Schaeffer, judge of the third judicial district court in and for Utah Territory, this 4th day of Oct. A. D. 1876.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.]

C. S. HILL, *Clerk.*
By *Deputy Clerk.*

143 I return the within subpœna, having duly served the same by reading to the within named party.

THEO. McKEAN,
Sheriff S. L. Co.

Fees and mil'age 45 c.

(Indorsed:) No. 2729. District court, third judicial district, county of Salt Lake. D. H. Wells, plaintiff, against Oliver A. Patton et al., defendant. Subpœna. Filed Oct. 6, 1876. C. S. Hill, Clerk.

144 *Memorandum of costs and disbursements in the matter of contempt.*

In the district court in and for the third judicial district of Utah Territory. County of Salt Lake.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

Disbursements:
Sheriff's fees, $. 45; clerk's fees, 5.00; witness fees, B. B. Bitner 2 days, 3.00; and 25 miles, 5.00—13.45.

TERRITORY OF UTAH,
County of Salt Lake, ss:

W. W. Woods, being duly sworn, says that he is one of the attorneys for the pl'ff in the above entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff. That the items in the above memorandum contained are correct to the best of said affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in said action.

W. W. WOODS.

Subscribed and sworn to before me this 9th day of October, A. D. 1876.

C. S. HILL, *Clerk.*

(Indorsed:) No. . Filed Oct 9th, 1876. C. S. Hill, clerk.

145 *Subpœna.*

In the district court of the third judicial district of the Territory of Utah. Salt Lake County, Sept. term, A. D. 18 .

Hon. Michael Schaeffer, judge.

DANEIL H. WELLS, PLAINTIFF,
against
OLIVER A. PATTON & RICHARD GREENWAY, defendants.

The people of the United States, in the Territory of Utah, send greeting to Daneil H. Wells.

We command you that, all and singular, business and excuses being laid aside, you appear and attend before the third judicial district court of the Territory of Utah, at a term of said court to be held at the court-house in Salt Lake City on the 9th day of Oct., A. D. 1876, at 10 o'clock a. m., then and there to testify in the above-entitled action now pending in said district court on the part of the defendants, and disobedience will be punished as a contempt by the said court.

Witness Hon. Michael Schaeffer, judge of the third judicial district court in and for Utah Territory, this 7th day of October, A. D. 1876.

140 Wherefore they, and each of them, pray to be hence dismissed by this honorable court with their costs in this behalf expended.

J. C. HEMINGRAY,
C. H. MORGAN,
Atty's for Respondents.

TERRITORY OF UTAH,
Salt Lake County, ss:

Oliver A. Patton and Richard Greenway, each being duly sworn, each for himself, and not for one another, deposes and says:

1. That he is the respondent mentioned in the foregoing answer; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of own knowledge, except as to those matters therein stated upon his information and belief, and as to those matters he believes it to be true.

OLIVER A. PATTON,
RICHARD GREENWAY.

Subscribed and sworn to before me, this 6 day of October, 1876.

C. S. HILL, *Clerk.*

141 (Indorsed :) 2729. In the matter of the contempt of Oliver A. Patton and Richard Greenway. Filed Oct. 6, 1876. C. S. Hill, Clerk.

142 *Subpœna.*

In the district court of the third judicial district of the Territory of Utah. Salt Lake County. Sept. term, A. D. 1876.

Hon. M. Schaeffer, Judge.

DANEIL H. WELLS, PLAINTIFF,
against
OLIVER A. PATTON & R. H. GREENWAY,
defendants.

The Territory of Utah, send greeting to B. B. Bitner:

We command you, that all and singular, business and excuses being laid aside, you appear and attend before the third judicial district court of the Territory of Utah, at a term of said court to be held at the court house in Salt Lake City on the 5th day of October, A. D. 1876, at 9 o'clock a. m., then and there to testify in the above entitled action now pending in said district court, on the part of the pl'ff, and disobedience will be punished as a contempt by the said court.

Witness Hon. M. Schaeffer, judge of the third judicial district court in and for Utah Territory, this 4th day of Oct. A. D. 1876.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.]

C. S. HILL, *Clerk.*
By *Deputy Clerk.*

143 I return the within subpœna, having duly served the same by reading to the within named party.

THEO. McKEAN,
Sheriff S. L. Co.

Fees and mil'age 45 c.

(Indorsed:) No. 2729. District court, third judicial district, county of Salt Lake. D. H. Wells, plaintiff, against Oliver A. Patton et al., defendant. Subpœna. Filed Oct. 6, 1876. C. S. Hill, Clerk.

144 *Memorandum of costs and disbursements in the matter of contempt.*

In the district court in and for the third judicial district of Utah Territory. County of Salt Lake.

DANEIL H. WELLS, PLAINTIFF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, defendants.

Disbursements:
Sheriff's fees, $. 45; clerk's fees, 5.00; witness fees, B. B. Bitner 2 days, 3.00; and 25 miles, 5.00—13.45.

TERRITORY OF UTAH,
County of Salt Lake, ss:

W. W. Woods, being duly sworn, says that he is one of the attorneys for the pl'ff in the above entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff. That the items in the above memorandum contained are correct to the best of said affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in said action.

W. W. WOODS.

Subscribed and sworn to before me this 9th day of October, A. D. 1876.

C. S. HILL, *Clerk.*

(Indorsed:) No. . Filed Oct 9th, 1876. C. S. Hill, clerk.

145 *Subpœna.*

In the district court of the third judicial district of the Territory of Utah. Salt Lake County, Sept. term, A. D. 18 .

Hon. Michael Schaeffer, judge.

DANEIL H. WELLS, PLAINTIFF,
against
OLIVER A. PATTON & RICHARD GREENWAY, defendants.

The people of the United States, in the Territory of Utah, send greeting to Daneil H. Wells.

We command you that, all and singular, business and excuses being laid aside, you appear and attend before the third judicial district court of the Territory of Utah, at a term of said court to be held at the court-house in Salt Lake City on the 9th day of Oct., A. D. 1876, at 10 o'clock a. m., then and there to testify in the above-entitled action now pending in said district court on the part of the defendants, and disobedience will be punished as a contempt by the said court.

Witness Hon. Michael Schaeffer, judge of the third judicial district court in and for Utah Territory, this 7th day of October, A. D. 1876.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.] C. S. HILL, *Clerk*,
By , *Deputy Clerk*.

146 (Indorsed:) No. 2729. District court, third judicial district, county of Salt Lake. Daneil H. Wells, plaintiff, againt Oliver A. Patton et al., defendant. Subpœna. Filed Oct. 9th, 1876. C. S. Hill, clerk.

TERRITORY OF UTAH,
Salt Lake County, ss:

U. S. MARSHAL'S OFFICE.

I hereby certify that I served the within subpœna in the county of Salt Lake, Territory of Utah, on the 9th day of October, A. D. 1876, on the within-named witness, Daneil H. Wells, by reading the within subpœna to him.

Dated Salt Lake City, Oct. 9th, 1876.

WILLIAM NELSON,
U. S. Marshal,
By SAMUEL L. SPRAGUE,
Deputy.

Fees, 60 c.

147 In the district court for the third judicial district of the Territory of Utah.

DANEIL H. WELLS, PL'FF,
vs.
OLIVER A. PATTON AND RICHARD GREENWAY, def'ts.

In the matter of the alleged contempt of said Oliver A. Patton and Richard Greenway.

Now on this day this cause came on to be heard on the affidavits of plaintiff, the answer of said defendants, and the proofs in the cause; and the evidence and all things being seen and heard by the court, after argument of counsel, and the court being duly advised in the premises, it is found that the said Oliver A. Patton and Richard Greenway, defendants, committed a contempt of court in selling the goods and chattles described in the complaint herein after service upon them, and each of them, of the writ of injunction in this cause. It is therefore ordered and adjudged by the court that the said Oliver A. Patton and Richard Greenway are in contempt of this court, and that they pay the costs of this motion to adjudge them in contempt taxed
148 at thirteen and $\frac{45}{100}$ dollars, and that upon such payment being made they be adjudged purged of said contempt.

And said defendants propose to show in connection with said record that the property therein described and that now in question were the same, and that said defendants were convicted of a contempt of this court for violating the injunction issued therein by making the sale thereby forbidden by the injunction granted, and that the sale so enjoined is the sale through which the plaintiff claims.

To the introduction and admission of which said offered record and testimony the said plaintiff objected on the ground that the same was immaterial and irrelevant; that said district court thereupon ruled and

decided that said objection was well taken, that said record and testimony be not admitted. To which ruling and decision the said defendants, by their counsel, then and there excepted.

The judge of the said district court submitted the case to the jury and instructed them as follows, to wit:

149 The plaintiff asks and the court gives you the following instructions. To make a case to entitle the plaintiff to recover, it is only necessary for the plaintiff to show by a preponderance of the testimony that the logs in question and the logs from which the lumber in question was made were cut on government lands, seized by the timber agents, and sold to the plaintiff, and that the defendants detained the logs and lumber from the plaintiff. If the defendants or any of them claim the trespass to have been compromised by paying government stumpage, it is for such defendant or defendants to prove as a defence the settlement and actual payment of the stumpage. The fact that the stumpage was paid for five thousand feet for July and August does not invalidate the seizure and sale of the remainder of the logs and lumber, but the plaintiff cannot recover the five thousand feet. The value of the lumber seized and sold plaintiff should be assessed at its fair cash value at the mills of the defendant, if the plaintiff is entitled to recover, deducting, however, the 5,000 feet on which stumpage was paid.

The court on its own motion further instructed the jury: The main question for you to determine under this evedence is the value of the lumber seized, if you and for the plaintiff the value of the lumber

150 seized and sold to the plaintiff by these timber agents, the law being that the government has the right where timber is cut on its lands to follow that timber up and take it unless it is cut by agreement and the agreement faithfully carried out. The policy of the government has been to favor parties living in sections of the country where timber was needed, and as you are aware from the instructions given to these timber agents authorizing them to allow parties to cut timber by paying a certain amount of stumpage, a low rate for the value of the timber. This, however, is an agreement on the part of the government through its agents, with other parties, which must be faithfully carried out, and parties who do not enter into an agreement of that kind become liable under the law for the timber taken.

We have in this case nothing to do with the question of compromise, or what should be paid by the man who cuts timber on government lands. That is a question for settlement or adjustment between the parties themselves, and if they do not effect such settlement or adjustment between them, and the case comes before the courts and juries, they simply have to carry out the law, the law being that the government can take the timber, no matter in what shape it is; so long as it can be identified as the property of the government, as being cut on

151 government land, they had a right to seize it, sell it, and enjoy the benefits and avails of it. Cases of this kind may work a hardship; persons getting into difficulty, as is shown here, with timber agents, and unsatisfactory arrangement or arrangements being partially made, but not completed, may work, and often do work, hardship for one or the other parties; but we must take the law as it is, and if you find that the logs from which this lumber was made were cut on government lands, that the stumpage on the logs or trees was not paid for or settled or adjusted, according to the arrangements which the timber agents were authorized to make, it is the government's lumber wherever it may be and in whatever shape it may be, so long as it can be recognized as the lumber that came from the government land; and if

you find that such be the fact, that this lumber was cut on the government land, and that it was seized by these government agents, they had a right to dispose of it, and this plaintiff had a right to buy it. It is not for you to inquire into the irregularities of the sale, but he had a right to buy it, and if he bought it and paid his money for it, he had a right to do it, and if it was refused him he had a right to recover whatever it was reasonably worth. It is for you to determine the
152 amount of lumber and the price of it at the time. If you find for the plaintiff and find the value of the property, he is entitled under our laws to interest from the demand for the property until the present. Which were all the instructions given to said jury.

The defendants by their counsel then and there excepted to the said change in the following particulars, to wit:

1st. The instruction that the plaintiff was entitled to recover on a preponderance of testimony and without finding a wrongful detention of the property in the following words: "To make a case to entitle the plaintiff to recover, it is only necessary for the plaintiff to show by a preponderance of testimony that the logs in question and the logs from which the lumber in question was made were cut on government land, seized by the timber agents, and sold to the plaintiff, and that the defendants detained the logs and lumber from the plaintiff."

2nd. The instructions given in the following words:

"The policy of the government has been to favor parties living in sections of the country where timber was needed, and as you are aware from the instructions given to these timber agents authorizing
153 them to allow parties to cut timber by paying a certain amount of stumpage, a low rate for the value of the timber. This however is an agreement on the part of the government through its agents with parties which must be carefully carried out and parties who do not enter into an agreement of that kind become liable under the law for the timber taken. We have in this case nothing to do with the question of compromise, or what should be paid by the man who cuts timber on government land. That is a question for settlement and adjustment between the parties themselves, and if they did not effect such a settlement or adjustment between them, and the case comes before the courts and juries, they have simply to carry out the law, the law being that the government can take the timber no matter in what shape it is; so long as it can identified as the property of the government, as being cut on government land, they had a right to seize it, sell it, and enjoy the benefits and avails of it."

3rd. The instructions given in the following words: "If you find that the logs from which this lumber was made was cut on government lands, that the stumpage on the logs or trees was not paid for or settled for or adjusted according to the arrangements which the timber
154 agents were authorized to make, it is the government's lumber wherever it may be, and in whatever shape it may be, so long as it can be recognized as the lumber that came from the government land; and if you find that such be the fact, that this lumber was cut on the government land, and that it was seized by these government agents, they had a right to dispose of it and this plaintiff had a right to buy it."

4th. The instruction given in the following words: "If it (the lumber and logs) was refused him (the plaintiff), he has a right to recover whatever it was reasonably worth. It is for you to determine the amount of lumber and the price of it at the time, if you find for the plaintiff, as the amount of your verdict."

5th. The instructions in the following words: "If you find for the plaintiff and find the value of the property, he is entitled under our laws to interest from the demand for the property until the present."

The defendants then and there requested the said judge in writing to instruct and charge the said jury as follows:

If the jury find that the mill owners in Utah generally had been permitted by the government to supply themselves with logs from
155 the public lands prior to the cutting of the timber in question, and in consideration of stumpage to be collected afterwards by timber agents, such course of dealing implies a licence to mill owners to cut timber to supply their several mills, and all mill owners alike were entitled to act on such licence, and no timber cut pursuant to it would be liable to seizure afterwards, especially if stumpage therefor was not refused to be paid. To give said instruction said judge refused, and to such refusal the defendants by their counsel then and there excepted.

The defendants by their counsel then and there excepted to the instructions given to said jury by said judge in this, that he thereby withheld from the jury the question whether the defendants were guilty of the unlawful or wrongful detention of the property in question, by charging them that the main question for them to decide was the quantity and value of the property, thereby assuming and misleading the jury to assume that the defendants were guilty if the timber constituting the property came from government land.

LIST OF ERRORS.

The defendants state below specifically the particular error or
156 grounds upon which they intended to rely on their appeal founded upon their foregoing statement and judgement roll.

1st. The court erred in refusing to admit in evidence on the trial the record in the suit commenced July 10th, 1875, by Daniel H. Wells as plaintiff against Oliver A. Patton, V. M. C. Silva, and other defendants, and the evidence offered in connection therewith, to wit, that the property in controversy in the suit on trial was a part of the property in question in said suit the record of which was offered as aforesaid; that said Wells gave the bond and paid the costs and expenses required by the stipulation contained in said record, and that the defendants therein released the property and delivered the same to said Wells.

2nd. The court erred in refusing to admit in evidence the record in the suit commenced Sept. 16th, 1876, by Daniel H. Wells, as plaintiff, against Oliver A. Patton and Richard Greenway, and the testimony offered in connection with said record, to wit, that the property in question in the action mentioned in the said record was the same and wholly identical with that in question in the suit on trial.

3rd. That the court erred in refusing to admit in evidence the record in the suit commenced Sept. 27, 1876, by Daniel H. Wells, as
157 plaintiff, against Oliver A. Patton and Richard Greenway, defendants, and the testimony offered in connection therewith, viz, that the sale enjoined in said suit mentioned in said record was the sale through which said plaintiff claims, and that the defendants therein were convicted for making it of a contempt of court as a violation of the injunction granted in said suit.

4th. The court erred in giving each of the several instructions stated in several exceptions to the charge to the jury numbered from one to five inclusive.

5th. The court erred in refusing to give the charge or instruction requested by said defendants.

6th. The court erred in withholding from the jury the question whether the defendants were guilty of the unlawful or wrongful detention of the property in question, by charging them that the main question for them to decide was the quantity and value of the property, thereby assuming, and misleading the jury to assume, that the defendants were guilty, if the timber constituting the property in question came from the government land.

7. The judgement is erroneous because it does not follow the verdict; it is not a judgement for delivery of the property and for the value thereof in the alternative in case a delivery cannot be had, but is for the absolute payment of the value and damages together.

158 J. G. SOUTHERLAND,
WOODS AND GEE,
Def'ts' Att'ys.

This is to certify that the foregoing statement has been settled and agreed upon by us and that it is correct.

SUTHERLAND & KIMBALL AND
WOODS AND GEE, *Def'ts Att'ys.*
BENNET AND HARKNESS,
Att'ys for Pl'ff.

(Indorsed:) Filed July 20th, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

159 *Notice of appeal.*

In the district court of the 3d judicial district of the Territory of Utah, county of Salt Lake.

JOHN NICHLES, PLAINTIFF,
vs.
DANIEL H. WELLS, WILLIAM LIVINGSTON, and B. B. Bitner, defendants.

You will please take notice that the defendants in the above entitled action hereby appeal to the supreme court of this Territory from the judgement therein rendered and entered, in the said district court, on the second (2nd) day of June, A. D. 1877, in favor of the plaintiff in said action, and against defendants, and from the whole thereof.

Dated this day of July, 1877.

Yours truly,

SUTHERLAND & KIMBALL, AND
WOODS & GEE,
Att'ys for Defendants.

To the clerk of said district court and Bennett & Harkness, att'ys for pl'ff.

(Endorsed:) In the district court, 3d judicial district of the Territory of Utah. John Nichles vs. Daniel H. Wells et al. Notice of appeal. Received service this 20th day of July, 1877. Bennett & Harkness, pl'ffs att'ys'. Filed July 20th, 1877, at 10 o'clock a. m. C. S. Hill, clerk, by B. P. Hill, deputy clerk. Sutherland & Kimball, def'ts' att'ys.

160 *Bond on appeal and to stay execution.*

In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN NICKLES, PLAINTIFF,
vs.
DANEIL H. WELLS, WILLIAM LIVINGSTON, AND B. B. Bitner, defendants.

Whereas the defendants in the above-entitled action have appealed to the supreme court of the Territory of Utah from a judgement made and entered against them in said action in the said district court, in favor of said plaintiff, for the delivery of certain property described in the complaint, and in case a delivery could not be had, for the sum of $1,615.00, the value thereof, and $185.00 damages, and $109.90 costs, against the defendant, Daneil H. Wells:

Now, therefore, we, the undersigned, residents of the city and county of Salt Lake, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal or
161 on a dismissal thereof, not exceeding one hundred dollars, to which we acknowledge ourselves jointly and severally bound.

And whereas, the appellants are desirous of staying the execution of said judgement so appealed from, we do further in consideration thereof, and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves further jointly and severally bound, in the further sum of three thousand eight hundred nineteen and $\frac{80}{100}$ dollars, being double the amount named in said judgement, that if the said judgement appealed from, or any part thereof, be affirmed on the appeal, be dismissed, the appellants will deliver said property to the plaintiff, or the said appellant, Daneil H. Wells, will pay the amount directed to be paid by the judgement or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants on the appeal, and that said appellants shall obey the order of the appellate court on the appeal.

ANDREW BURT,
Police Officer.
JOSEPH E. TAYLOR,
City Sexton.

162 TERRITORY OF UTAH,
County of Salt Lake, ss:

Andrew Burt and Jos. E. Taylor, the persons named in and who subscribed the foregoing undertaking as the surities thereto, being severally duly sworn, each for himself, says that he is worth the amounts specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution, and that he is a resident and freeholder within said county.

ANDREW BURT,
Police Officer.
JOSEPH E. TAYLOR,
City Sexton.

Subscribed and sworn to this 20th day of July, 1877, before me,
[SEAL.] WM. CLAYTON,
Notary Public.

5th. The court erred in refusing to give the charge or instruction requested by said defendants.

6th. The court erred in withholding from the jury the question whether the defendants were guilty of the unlawful or wrongful detention of the property in question, by charging them that the main question for them to decide was the quantity and value of the property, thereby assuming, and misleading the jury to assume, that the defendants were guilty, if the timber constituting the property in question came from the government land.

7. The judgement is erroneous because it does not follow the verdict; it is not a judgement for delivery of the property and for the value thereof in the alternative in case a delivery cannot be had, but is for the absolute payment of the value and damages together.

158 J. G. SOUTHERLAND,
WOODS AND GEE,
Def'ts' Att'ys.

This is to certify that the foregoing statement has been settled and agreed upon by us and that it is correct.

SUTHERLAND & KIMBALL AND
WOODS AND GEE, *Def'ts Att'ys.*
BENNET AND HARKNESS,
Att'ys for Pl'ff.

(Indorsed:) Filed July 20th, 1877. C. S. Hill, clerk, by H. G. Mc Millan, deputy clerk.

159 *Notice of appeal.*

In the district court of the 3d judicial district of the Territory of Utah, county of Salt Lake.

JOHN NICHLES, PLAINTIFF,
vs.
DANIEL H. WELLS, WILLIAM LIVINGSTON, and B. B. Bitner, defendants.

You will please take notice that the defendants in the above entitled action hereby appeal to the supreme court of this Territory from the judgement therein rendered and entered, in the said district court, on the second (2nd) day of June, A. D. 1877, in favor of the plaintiff in said action, and against defendants, and from the whole thereof.

Dated this day of July, 1877.

Yours truly,

SUTHERLAND & KIMBALL, AND
WOODS & GEE,
Att'ys for Defendants.

To the clerk of said district court and Bennett & Harkness, att'ys for pl'ff.

(Endorsed:) In the district court, 3d judicial district of the Territory of Utah. John Nichles vs. Daniel H. Wells et al. Notice of appeal. Received service this 20th day of July, 1877. Bennett & Harkness, pl'ffs att'ys'. Filed July 20th, 1877, at 10 o'clock a. m. C. S. Hill, clerk, by B. P. Hill, deputy clerk. Sutherland & Kimball, def'ts' att'ys.

160 *Bond on appeal and to stay execution.*

In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

JOHN NICKLES, PLAINTIFF,
vs.
DANEIL H. WELLS, WILLIAM LIVINGSTON, AND B. B. Bitner, defendants.

Whereas the defendants in the above-entitled action have appealed to the supreme court of the Territory of Utah from a judgement made and entered against them in said action in the said district court, in favor of said plaintiff, for the delivery of certain property described in the complaint, and in case a delivery could not be had, for the sum of $1,615.00, the value thereof, and $185.00 damages, and $109.90 costs, against the defendant, Daneil H. Wells:

Now, therefore, we, the undersigned, residents of the city and county of Salt Lake, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal or
161 on a dismissal thereof, not exceeding one hundred dollars, to which we acknowledge ourselves jointly and severally bound.

And whereas, the appellants are desirous of staying the execution of said judgement so appealed from, we do further in consideration thereof, and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves further jointly and severally bound, in the further sum of three thousand eight hundred nineteen and $\frac{80}{100}$ dollars, being double the amount named in said judgement, that if the said judgement appealed from, or any part thereof, be affirmed on the appeal, be dismissed, the appellants will deliver said property to the plaintiff, or the said appellant, Daneil H. Wells, will pay the amount directed to be paid by the judgement or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants on the appeal, and that said appellants shall obey the order of the appellate court on the appeal.

ANDREW BURT,
Police Officer.
JOSEPH E. TAYLOR,
City Sexton.

162 TERRITORY OF UTAH,
County of Salt Lake, ss:

Andrew Burt and Jos. E. Taylor, the persons named in and who subscribed the foregoing undertaking as the surities thereto, being severally duly sworn, each for himself, says that he is worth the amounts specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution, and that he is a resident and freeholder within said county.

ANDREW BURT,
Police Officer.
JOSEPH E. TAYLOR,
City Sexton.

Subscribed and sworn to this 20th day of July, 1877, before me,
[SEAL.] WM. CLAYTON,
Notary Public.

(Indorsed:) District court, 3rd judicial. John Nickles vs. Daneil H. Wells et al. Bond on appeal to supreme court. Filed July 20, 1877, at 4.50 o'clock p. m. C. S. Hill, clerk, by B. P. Hill, deputy clerk.

163 In third district court of Utah Territory, Salt Lake County.

JOHN NICKLES
vs.
DANIEL H. WELLS ET AL, APPELLANTS.

Now come defendants and appellants and move that the time for filing transcript on appeal to the supreme court be extended to and include the 20th day of September, 1877.

J. G. SUTHERLAND,
WOODS & GEE,
Att'ys for Def'ts & Appellants.

On the presentation of the foregoing application, it is ordered that the time for filing the transcript on appeal, with clerk of supreme court, be extended to & include Sept. 20, 1877.

Done at chambers this 25th day of August, 1877.

M. SCHAEFFER,
Chief Justice Supreme Court, Utah T'y.

(Endorsed:) In the district court of Utah Territory, Salt Lake County. John Nickles vs. Daniel H. Wells et al., appellants. Filed Aug. 20th, 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

(Indorsed:) John Nickles vs. Daniel H. Wells et al. Transcripts on appeal. Filed in my office, Sept. 18th, A. D. 1877. E. T. Sprague, clerk sup. court.

164 And, afterwards, at a term of said supreme court of Utah Territory, begun and held at Salt Lake City on the 14th day of January, A. D. 1878, proceedings were had in said court and said cause and entered on the records of said court as follows:

THURSDAY, *January 17th*, A. D. 1878.

A session of the supreme court of Utah Territory was held this day beginning at ten o'clock a. m. Present all the justices, the clerk, marshal and members of the bar. Court was duly opened.

* * * * * * *

JOHN NICKLES, RESPONDENT,
vs.
DANIEL H. WELLS ET AL., APPELLANTS. } From 3d dist.

This cause coming on regularly for hearing was argued by J. G. Sutherland, esq., for appellant, submitted and taken under advisement by the court.

165 MONDAY, *February 11th, A. D.* 1878.

A session of the supreme court of the Territory of Utah was held this day beginning at two o'clock, p. m. Present all the justices, the clerk, marshal, and members of the bar. The court was duly opened.

* * * * * * *

JOHN NICKLES, RESPONDENT,
vs.
DANIEL H. WELLS ET AL., APPELLANTS. } From 3d dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgment of the district court be and the same is hereby affirmed with costs.

JOHN NICKLES, RESPONDENT,
vs.
DANIEL H. WELLS ET AL., APPELLANTS. } From 3d dist.

Upon the suggestion of J. G. Sutherland, esq., for appellants, of removal of this cause to U. S. Supreme Court, the amount of a supersedeas bond therefor, was fixed at the sum of three thousand dollars.

166 And on said 11th day of February, A. D. 1878, there was filed in the office of the clerk of said supreme court at Utah Territory the opinion of said court in said cause, of which the following is a copy, to wit:

167 In the supreme court of Utah Territory.—January term, 1878.

JOHN NICKLES, RESPONDENT,
vs.
DANIEL H. WELLS ET AL., APPELLANTS.

Appeal from the third district court.

Boreman, justice, delivered the opinion of the court. Oliver A. Patton and V. M. C. Silva were respectively register and receiver of the land office in Salt Lake City, and as such they were timber agents of the United States Government, and Richard Greenway was under the register and receiver a deputy timber agent. These parties, as timber agents of the government, seized and sold for the government certain logs and lumber cut from government lands and sawed at the mills owned and operated by the appellant and upon which no stampage had been paid. At the sale the respondent became the purchaser, and leaving one Wilson to look after the property, went after and brought his teams to take the same away, but was prevented from doing so by appellant. Thereupon the respondent brought this action for the property or its value, and in the district court the verdict and judgment being for the respondent, the appellant, Wells, brings the case to this court.

168 It is alleged as error that the district court rejected the record in the case of D. H. Wells against O. A. Patton and others begun in 1875, and in which it is averred that there was a compromise entered into between Wells on the one side and the timber agents on the other as to a large part of the property now involved in this action. After the alleged compromise the suit proceeded and the demurrer of the defendants therein was sustained to the complaint, and the suit dismissed by order of court. The main if not the whole trouble in this case arises from a confounding of the individuals with the government. The title which the respondent claims comes from the government through its agents, and not from the agents as individuals owning the property.

The timber agents were, under certain circumstances, authorized to

compromise such matters, and release the property, but they had no power to do so except upon payment of the stampage and also the expenses. In the case referred to of Wells vs. Patton and others the stampage had not been paid. It was not therefore such a compromise as the agents were authorized to make, and the government was not bound to respect it. The agents were acting outside of and beyond their instructions, and whatever they should do under such circumstances
169 could be ignored by the government without its losing any rights. Suppose that immediately after this alleged compromise the government had seen proper to have changed its timber agents, would it be pretended that new agents were bound to recognize as binding this unauthorized arrangements of their predecessors? Not at all. The acts of the agents are acts of the government only so far as the agents keep within the line of duty and within the powers granted to them.

It cannot, therefore, be said that the respondent derived title from the same source that the appellant did, for the appellant obtained his title from an unauthorized compromise and act of an agent, which compromise and act the government chose not to recognize, and the respondent derives his title from the government, through its authorized agents, acting within the scope of their authority. The respondent, not having been a party to that suit, is not bound by what was done in it.

It is likewise urged as error, that the district court excluded another record, the record in the case of Daniel H. Wells vs. Patton, and Greenway began September 16th, 1876, for claim and delivery of this same property.

In that case Patton and Greenway, acting as timber-agents, had seized the property for the government. They were acting strictly within the line of their duty, as specified in their instructions from the Gen-
170 eral Land Office at Washington. Their possession was, therefore, the possession of the government, and the property could not be taken out of that possession by suit. Besides, the action was not determined, but was then pending, and the legal right to the property in abeyance, so far as the parties to that action were concerned. The possession of Wells against those two individuals may have been good, if the government rights be placed out of view, and yet it would not follow that Wells' right, as against the government, was valid. Hence it is a good objection to that record, as it was to the first one offered, that the respondent not having been a party to the action, and having obtained his title from the government, he cannot be held bound by that action.

The same reasoning would apply to the third record offered and rejected, but the point as to its rejection is not raised in the brief of appellant, and we presume that no stress was laid upon it.

The instructions do not seem liable to the objections urged. Especial objection is taken to the court saying, that to make a case to entitle the plaintiff to recover, it is only necessary for him to show that the logs were cut on government land, that the timber-agents seized it
171 and sold it to *to* plaintiff, and that the defendant detained it, and if the defendants claim that the trespass was compromised, they must show it. When taken in connection with the other instructions, we do not see that the jury could be misled, or that there was any error. It is not proper to single out one instruction and claim it to be objectionable in itself; all instructions must be considered together.

The instructions asked by the defendants, the appellants, were improper to be given to the jury, and were properly refused by the court. That instructions, in effect, declared that because the government had

for a time failed to execute the law in this Territory, that therefore it should never begin to do so. We cannot see that because some or all go unpunished for a while we are to imply a license ad libitum to commit offences. The mildness of the government, in the instance of this Territory, was extriordinary, and perhaps commendable, but that mildness ought not to be allowed as a plea of waiver, by the government, of its rights. It might be a strong plea for pardon in case of criminal charge, but it has no effect upon the rights of the government.

The judgement of the court below is affirmed with costs.

172 (Endorsed:) In the Supreme Court, January term, 1878. John Nickles, respondent, vs. Daneil H. Wells, et al., appellants. Filed in my office, this 11th day of February, A. D. 1878. E. T. Sprague, clerk.

173 And afterwards, on the 25th day of February, A. D. 1878, was issued and filed in said office of the clerk of the supreme court of Utah Territory a writ of error (of which a copy was deposited in said clerk's office) and a citation both in said cause; the original of which said writ, and of said citation, with proof of the service of the latter, follow, to wit:

174 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, and also in the rendition of the judgement of a plea which is in the supreme court of the Territory of Utah before you, between John Nickles, plaintiff, and Daniel H. Wells, William Livingston, and B. B. Bitner, defendants, a manifest error hath happened, to the great damage of the said Daniel H. Wells, William Livingston, and B. B. Bitner, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that the record and proceed-
175 ings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United States, and the seal of said supreme court of Utah Territory, the 25th day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

175½ (Indorsed:) John Nickles vs. Daniel H. Wells et al. Writ of error. Filed February 25th, 1878. E. T. Sprague, clerk supreme court of Utah Territory.

176 United States of America John Nickles, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's

office of the supreme court of the Territory of Utah, wherein Daniel H. Wells, William Livingston, and B. B. Bitner are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Michael Schaeffer, chief justice of the supreme court of the Territory of Utah, this 25th day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

MICHAEL SCHAEFFER,
Chief Justice Sup. Court, Utah Terr'y.

177 (Indorsed:) Service of the within citation admitted this 25th day of February, 1878. Bennett & Harkness, att'ys for def't in error. Filed February 25th, 1878. E. T. Sprague, clerk of supreme court of Utah Territory.

178 And on said 25th day of February, A. D. 1878, was also filed in said clerk's office a supersedeas bond in said cause, of which the following is a copy, to wit:

179 In the supreme court of the Territory of Utah.

Know all men by these presents that we, Andrew Burt and Joseph E. Taylor, of the city of Salt Lake and Territory of Utah, are held and firmly bound unto John Nickles in the full and just sum of three thousand dollars, to be paid to the said John Nickles, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this 25th day of February, in the year one thousand eight hundred and seventy-eight.

Whereas, lately, a judgement in a suit depending in said court between John Nickles, plaintiff & respondent, and Daniel H. Wells, William Livingston, and B. B. Bitner, defendants and appellants, was rendered against the said defendants and appellants, and they having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgement in the aforesaid suit, and a citation directed to the said John Nickles, citing and admonishing him to be and
180 appear at a Supreme Court of the United States, to be holden at Washington the second Monday in October next:

Now, the condition of the above obligation is such that if the said Daniel H. Wells, William Livingston, and B. B. Bitner shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

DANIEL H. WELLS.
ANDREW BURT.
JOSEPH E. TAYLOR.

(Endorsed:) The within bond is satisfactory as to form & sureties. Feb'y 25th, 1878. Bennett & Harkness, att'ys for def't in error. Filed Feb'y 25th, 1878. E. T. Sprague, clerk of sup. court of Utah Territory. Approved Feb'y 25th, 1878. Michael Shaeffer, chief justice sup. court, Utah Territory.

181 TERRITORY OF UTAH,
City and County of Salt Lake, ss:

I, E. T. Sprague, clerk of the supreme court of said Territory, in obedience to the writ of error hereto attached, hereby return to the Supreme Court of the United States said original writ and the original citation issued thereon, with proof of service of the latter, and a transcript of the record and proceedings in and of said supreme court of said Territory, of the opinion of said last-named court, and supersedeas bond, all in the cause in said writ mentioned; and I hereby certify that said transcript of the record and proceedings, opinion, and bond is a true, perfect, full, and complete copy of the several originals thereof, on file or of record in my office.

In witness whereof I have hereunto set my hand and the seal of said supreme court of Utah Territory at Salt Lake City this 24th day of September, A. D. 1878.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsement on cover:) No. 345. Daniel H. Wells, William Livingston and B. B. Bitner, pl'ffs in error, vs. John Nickles. Utah Territory supreme court. Filed 23 November, 1878.

PLAINTIFFS' BRIEF.

SUPREME COURT OF THE UNITED STATES.

DANIEL H. WELLS, WILLIAM LIVINGSTON
AND B. B. BITNER,

Plaintiffs in Error,

VS.

JOHN NICKLES,

J. G. SUTHERLAND,
JOHN R. McBRIDE,
Att'ys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

DANIEL H. WELLS, ET AL.,

Plaintiff in Error,

VS.

JOHN NICKLES,

Defendant in Error.

STATEMENT OF THE CASE.

The action in the court below was replevin, brought by John Nickles against the plaintiffs in error, for certain pine logs and lumber, valued in the complaint at $4,500, and for $1,000 damages for detention. The action was brought October 11, 1876, and an unlawful taking alleged on the 3d of October of that year.

The property was taken on the writ, but not delivered to Nickles, the defendants in the action having given a re-delivery bond.

Transcript p. 4.

Wells and his co-defendants filed answer to the complaint putting in issue the plaintiff's title and right of possession, as well as the wrongful taking and detention.

The case was tried before the Third District Court of Utah Territory, and a jury, at the June term, in 1877; a verdict was rendered for the plaintiff for $1,800, including the assessed value of the property, and $109.70 costs. Judgment was entered June 2, 1877.

The statement on appeal discloses these facts: Testimony was given by the plaintiff, tending to show that the timber and lumber in question were made from trees cut on government land in 1874, 1875 and 1876, but only a small quantity—5,000 feet—in the latter year, and this was excluded by the charge of the court, from the consideration of the jury, because the stumpage on it had been paid.

Transcript, pp. 20, 21. Instruction on p. 53.

During the period occupied by this case, Oliver A. Patton and V. M. C. Silva, Register and Receiver of the local land office, were charged with the duties of timber agents for the government, by instructions from the Commissioner of the General Land Office.

Transcript, pp. 15—19.

They appointed as their subordinates Hefferman, McKay and Greenway. The plaintiff claimed title through a sale to him of the property by Patton, acting as timber agent, Sept. 28, 1876.

Daniel H. Wells was the principal defendant; the other defendants were his servants. He claimed to own and to have lawful possession of the property. He offered the documentary evidence, stated below, to show his rightful possession, and it was rejected by the court below, on the objection of the plaintiff.

1. He offered the original record of an equity suit brought by him July 10, 1875, against Patton, Silva, and their subordinates, as timber agents, to prevent, by injunction, a sale of a large quantity of logs and lumber seized by them as such agents, and advertised for sale, because made from timber taken from government land. This record is in the Transcript, commencing on p. 21. The complaint is believed to state good grounds for the equitable relief sought.

The record shows that after the complaint was filed a stipulation was made, which is to be found on pages 27 and 28 of the Transcript, for release of this property to Wells, on his paying the expenses of the seizure, etc., and giving sufficient security for payment of stumpage when it should be determined by the court on the complaint filed, which contained an

offer to pay it. He stipulated not to discontinue the suit without the defendants' consent, and that he would diligently prosecute it. The bill was afterwards dismissed on a demurrer subsequently filed by the defendants in derogation of the stipulation.

In connection with this record, there was an offer to prove payment of the expenses, the giving of the security, the identity of the property with that in question, and the surrender of it under the stipulation by the timber agents to Wells.

Transcript, p. 29.

That seizure had been shown on the cross examination of Patton [Transcript, p. 20], and by the testimony of Bitner [p. 21]. The sale to plaintiff was made after a second seizure of the same logs, made September 6, 1876.

Transcript, p. 19.
See latter part of Bitner's testimony on p. 21.

To the rejection of the record the defendants below excepted.

Transcript, p. 29.

2. The defendants below offered in evidence the original record in an action brought by Wells against Patton and Greenway, September 16, 1876, in replevin, for the very property in question, offering at the same time to prove the identity. By this record, it appears that the property was taken and delivered to Wells, as plaintiff.

Transcript, p. 32.

On objection of the plaintiff below, this record was rejected by the court, and exception taken.

Transcript, p. 36.

3. The defendants below also offered in evidence the original record in another action in equity, commenced by Wells against Patton and Greenway, by which it appears that Patton, who, as timber agent, afterwards made the sale to the plaintiff below, was enjoined and forbidden to make that very sale, and was convicted of a contempt of court for making it in violation of the injunction.

Transcript, pp. 36—52.

For offer of proof in connection with said record, the objection of the plaintiff, the ruling of the court, and exception.

See Transcript, pp. 52.

It appears from the Commissioner's instructions, [Transcript, pp. 15—19,] and the practice of the agents, [*Id.* pp. 19—21,] that it was not the policy of the government in Utah to *prevent* the cutting of timber on the public lands. Ex. press permission was not given to cut timber, but a large business was openly done by many persons with mills, in making lumber from government timber, the timber agents periodically collecting stumpage or reports of the amount cut.

See Commissioner's letter, June 21, 1875, in Transcript, p. 19.
Cross examination of Greenway, pp. 19 and 20.
Bitner's testimony, p. 21.

The court instructed the jury, in substance, that they had only to ascertain the value of the property in question, and if the same was made from timber taken from government land, to find for the plaintiff the amount of such value with interest.

Transcript, pp. 53, 54.

In this charge, the court recognize the policy of the government, in respect to cutting timber and paying stumpage, though it is not correctly stated.

ASSIGNMENT OF ERRORS.

1. The District Court, on the trial of this action, erred in refusing to admit in evidence, the record in the suit, commenced July 10, 1875, by Daniel H. Wells, as plaintiff, against Oliver A. Patton, V. M. C. Silva, and others, defendants, and the evidence offered in connection therewith, to wit: That the property in controversy in the suit on trial was part of the property in question in said suit, the record of which was offered as aforesaid; that said Wells gave the bond, and paid

the costs and expenses required by the stipulation contained in said record, and that the defendants therein released the property and delivered the same to said Wells.

2. Said court erred in refusing to admit in evidence, the record in the suit commenced September 16, 1876, by Daniel H. Wells, as plaintiff, against Oliver A. Patton and Richard Greenway, and the evidence offered in connection with said record, to wit: That the property in question in the action mentioned in said record, was the same and wholly identical with that in question in the suit on trial.

3. Said court erred in refusing to admit in evidence, the record in the suit commenced September 27, 1876, by Daniel H. Wells, as plaintiff, against Oliver A. Patton and Richard Greenway, defendants, and the testimony offered in connection therewith, to wit: That the sale enjoined in said suit mentioned in said record, was the sale through which said plaintiff, below, claimed, and that the defendants therein were convicted for making it, of a contempt of court; such sale being made in violation of the injuuction.

4. Said court erred in giving the jury the instruction asked by the plaintiff, below, in these words: "To make a case to entitle the plaintiff to recover, it is only necessary for the plaintiff to show, by a preponderance of the testimony, that the logs in question, and the logs from which the lumber in question was made, were cut on government lands, seized by the timber agents, and sold to the plaintiff, and that the defendant detained the logs and lumber from the plaintiff."

5. Said court erred in the instructions given on its own motion, in these words: "The main question for you to determine under this evidence, is the value of the lumber seized, if you find for the plaintiff—the value of the lumber seized and sold to the plaintiff by these timber agents, the law being that the government has the right where timber is cut on its lands to follow that timber up, and take it unless it is cut by agreement, and the agreement faithfully carried out. The policy of the government has been to favor parties living in sections of the country where timber was needed, and as you are aware from the instructions given to these timber agents, authorizing them to allow parties to cut timber by paying a certain amount of stumpage—a low rate for the value of the

timber. This, however, is an agreement on the part of the government, through its agents, with other parties, which must be carefully carried out, and parties who do not enter into an agreement of that kind, become liable under the law for the timber taken."

6. Said court erred in these further instructions given on its own motion: "We have, in this case, nothing to do with the question of compromise, or what should be paid by the man who cuts timber on government lands. That is a question for settlement or adjustment between the parties themselves, and if they do not effect such settlemnt or adjustment between them, and the case comes before the courts and jurors, they simply have to carry out the law, the law being that the government can take the timber, no matter in what shape it is so long as it can be identified as the property of the government, as being cut on government land, they had a right to seize it, sell it, and enjoy the benefits and avails of it. Cases of this kind may work a hardship; persons getting into difficulty, as is shown here, with timber agents, and unsatisfactory arrangement or arrangements being partially made, but not complete, may work, and often do, work hardship for one or the other parties; but we must take the law as it is, and if you find that the logs from which this lumber was made were cut on government lands, that the stumpage on the logs or trees was not paid for or settled or adjusted, according to the arrangement which the timber agents were authorized to make, it is the government's lumber wherever it may be, and in whatever shape it may be, so long as it can be recognized as the lumber that came from the government land, and if you find that such be the fact, that this lumber was cut on the government land, and that it was seized by the government agents, they had a right to dispose of it, and this plaintiff had a right to buy it. It is not for you to inquire into the irregularities of the sale, but he had a right to buy it, and if he bought it, and paid his money for it, he had a right to do it, and if it was refused him he had a right to recover whatever it was reasonably worth. It is for you to determine the amount of lumber and the price of it at the time."

BRIEF FOR PLAINTIFFS IN ERROR.

I.

The exclusion of the testimony mentioned in the first assignment of error was erroneious; for that testimony was material and admissible to show that a large part of the property in question, and in fact, all the property for which a verdict was rendered, was lawfully in the possession of Wells, when this action was commenced. It was lawfully surrendered to him in behalf of the government on terms precluding any subsequent recourse to it.

Nickles claims title from the same source and by the exercise of the same agency; hence any facts which would show or tend to show that Wells obtained both tittle and possession first were material and relevant.

The exclusion of this testimony raises some interesting questions, but it is believed they are of no intrinsic difficulty. The timber agents were not officers; nor was their agency created or defined by any statute. The Commissioner of the General Land Office, in virtue of his general powers under the land laws, has for many years assumed the oversight of the public lands, and has asserted the rights of the government in respect to timber cut on them.

The local agents were instructed by him as legal superior; but they were not his agents. Any authority belonging to his department which they chose to exercise needed no ratification by him to become effectual. He and they could only assert the common law rights of the government as a property owner, amongst which is that of taking possession of its own property; but it ought to be held, like an adult citizen, to its bargains. By these agents it exercised the right of taking possession in 1875; and having accepted terms satisfactory at the time, and such as any private owner demanding stumpage would not hesitate to accept, the property was returned to

Wells. A year afterwards, however, without any attempt to obtain payment in the manner stipulated, the property was again seized.

If it is conceded that the government had a right to the timber originally seized, because taken from the public lands, the timber agents becoming such, in some sort, as agents of necessity, should interpret their powers by the liberal disposition of the government towards frontier communities located on the public lands, and might properly limit their exactions to the value of the timber standing. If so, they were obviously authorized to enter into the stipulation by which the timber seized in 1875 was surrendered to Wells. If they represented the government at all, to settle trespasses, or for timber taken, or to take timber which had been tortiously severed, and to dispose of it, the ascertainment of the price, the mode of payment, the delivery, and everything properly incident to a compromise or a sale, would be within the scope of their powers. And this proposition must be equally essential to the plaintiff's title, for he claims through such a sale.

The suit to enjoin the sale of the logs was brought against the timber agents as such; it was brought in a court of general equity jurisdiction; the seizure and the threatened sale by these agents were complained of as being inequitable,and relief was sought by injunction against the sale on terms of doing equity by paying the value of the timber. By the stipulation the parties settled the merits of the case on that basis, provided for other security than the logs, and that they should be relinquished to Wells. Only the amount to be paid by him was left to be decided by the court. The defendants in that case afterwards ignored the provision in the stipulation for the ascertainment by the court of the amount to be paid, and precluded the inquiry by a demurrer to the complaint. The court had undoubted jurisdiction, whatever may be said of the merits of the complainants' case. What the court had power to adjudge the parties could mutually concede and fix by stipulation. A perpetual injunction, decreed in that case, would have settled the title not only as against the persons made defendants, as timber agents, but the government,which they represented, and which could not be sued; otherwise no right of a private citizen to property, disputed on behalf of the govern-

ment, could ever be finally adjudicated in any suit he could bring to quiet himself against repeated evictions without process.

Osborn vs. Bank of U. S., 9 Wheat, 738.
Davis vs. Gray, 16 Wall, 220.

The stipulation and the return of the property to Wells pursuant thereto were a final and irrevocable relinquishment of the timber to him.

The rejection of the evidence was not based on the ground that compensation to the government for the timber could not be ascertained in the manner contemplated by the stipulation, nor on any defect in the security. The reasons which governed the court, in this ruling, are not disclosed, except as they are to be inferred from the charge, that the title of the government could not be diverted until actual payment of stumpage.

In this connection, as having some bearing on the character of the act of cutting timber on the unsold lands of the United States in this Territory, it is proper to call attention to the act of March 2, 1831, which prohibits the cutting of timber on the public lands. We insist that that act has not been in force in Utah, on account of later inconsistent legislation by Congress.

Where that act is in force, it is an offense for any person to cut any kind of timber on the public domain, for his own use.

United States vs. Briggs, 9 How., 351.

A pre-emption settler has a rightful occupancy of government land; the law does not, in terms, however, grant him the right to cut timber, but unless it is implied, it would be impossible for him to maintain his settlement; he could make no improvements, build no houses or fences, or supply himself with the commonest comforts. Under such a construction, the pre-emption laws, deservedly regarded with so much favor, could confer but a barren privilege. Accordingly, he is treated as having that right by implication, upon lands included in his settlement, "to the extent necessary for domestic purposes, for clearing, building, fencing, fuel, etc."

See Commissioner's Circular, Transcript, p. 15.
And Letter of Nov. 4, 1870, *Id.* p. 17.

The reasoning, which exempts a pre-emption or homestead settler from the operation of that act, as to the lands settled on, would withdraw the whole Territory of Utah from its effect.

When organized as a Territory in 1850, all the land embraced in it was government land, and unsurveyed. Nineteen years elapsed before a land office was established there. The Territory had definite limits; a territorial government was granted by Congress for a community planted within those limits, and it has ever since been represented in Congress by a delegate. The right of people to live there, and the intention of Congress that there should be a permanent settlement, were then directly recognized and expressed. Had they been deemed trespassers, they would have received notice to quit; not invited to remain by being provided with a local government. They were not thus organized under the authority of Congress to live here like savages, but as a civilized people, having all the wants, and needing the same supplies for subsistence and shelter that other communities have. Hence, it is self-evident that the organization of this Territory, while all the land embraced in it was land of the United States, and unsurveyed, was a grant by Congress of permission to the inhabitants to occupy all or any part of the Territory, and to help themselves to whatever naturally existed for the supply of their wants, and to subserve the conveniences and purposes of civilized life. They were necessarily authorized to cultivate the soil, build houses, warm themselves by means of the fuel existing there, and in every way practice the industries, and provide the comforts and luxuries to which civilized communities are accustomed. The rights so conferred, are wholly inconsistent with the prohibition and penalties of that general act, to preserve the timber on the public domain.

II.

The exclusion of testimony complained of in the second and third assignments of error, was erroneous, because that rejected testimony tended to show that Wells' possession of the very property in question was lawful, and entitled to be

protected against the very sale through which Nickles claimed title.

Wells had possession of the property at the time of the sale to plaintiff, by virtue of a writ of replivin against Patton, the timber agent, who made the sale. During the pendency of that suit, his possession was lawful as against the defendant in that suit, and the government represented by him, and under whose title he defended, and as against any person purchasing *pendente lite* from him.

Portland Bank vs. Stubbs, 6 Mass., 422.
Lockwood vs. Perry, 9 Met., 444, 5.
Globe Works vs. Wright, 106 Mass., 207.
Powell vs. Bradler, 9 Gill. & J., 220.
Beers vs. Wuerpul, 24 Ark., 272.
Bond vs. Greenwald, 1 Mont. T., 570.
Belden vs. Laing, 8 Mich., 503.

The persistence of the timber agent in selling the property notwithstanding the replevin, and Wells' actual possession under it, and in spite of the injunction, if the ruling of the court below is sound, is a fair illustration of the exposure of private rights to remediless invasion, when a federal agent sets up any sort of opposing claim in behalf of the government. The person acting as an agent was held personally amenable to the jurisdiction of the court; but not so for any substantial purpose, in his representative character. He exercised his agency contumaciously against the utmost restraining power of the court, and when this was made known to the court its chastening hand dropped inertly on the agent explaining that he disobeyed the peremptory mandate to serve a privileged principal that could not be sued. And on the trial proof of the replevin and the injunction were rejected as immaterial and irrelevant; as not impairing the right of the timber agent to sell; and as not having even a tendency to disprove a wrongful detention of the property.

The opinion of the Territorial Supreme Court declares that the compromise of the suit mentioned under the first point was abortive because the government was not bound, and that the timber and lumber in possession of the timber agents after the second seizure was in the possession of the government, and "*could not be taken out of that possession by suit!*"

Transcript, p. 60.

"Besides," the court erroneously say, "the action was not determined, but was then pending, *and the legal right to the property in abeyance so far as the parties to that action were concerned.—Id.*

Comment upon these extracts would be superfluous. The action brought by Nickles, which is now under review, was a cross replevin. He claims through a sale from the defendant in a prior and pending replevin suit, who had been legally deprived of possession by the process in that suit, and had not regained it.

III.

The court erred in giving instructions to the jury. The substance of them is that if the jury find that lumber was made from timber cut on government lands, that it had been seized by the timber agent and sold to the plaintiff, and that defendants detained it, they should assume that such detention was unlawful, and proceed to assess the value and damages. The taking of timber from government land, without more, is held to be *prima facie* tortious, and the possession by any person of the product of that timber, is *prima facie* tortious, in this Territory, that it remains a tort until the regular *stumpage* is actually paid. The charge states as a fact that the Commissioner has established an agency here to sell timber for a low rate of *stumpage*, and that unless arrangements are made, and faithfully carried out, parties taking timber are liable for it, and the government may take and retake the property until the stumpage is collected.

Transcript, p. 53.

The circulars and letters from the Commissioner will not bear that construction. But it is true the timber agents were not appointed to prevent timber from being cut; nor did they exercise their agency for that purpose.

Transcript pp. 19—21.

The Commissioner says: [p. 19,] "Where the circum-

stances justify so doing, you may settle with the parties on their paying any expenses incurred and a reasonable stumpage for the timber. But you are to regard this as a compromise, *justified by existing circumstances*, and not as the granting of permission to cut the timber, which is forbidden by law. *You will not anticipate cases of the kind by printing blank forms in advance to be used therein, but any necessary papers may be made out as the cases arise.*"

See Greenway's Cross examination, pp. 19 and 20.

The actual practice under these instructions, testified to by Greenway and Patton, was probably not repugnant to any statute, when the circumstances relating to this Territory before adverted to are considered. That testimony justified the instruction requested by the defendants below, and which the court refused.

Transcript, p. 55.

In the absence of any statute forbidding the cutting of timber, the government, as a land owner, was as liable to the inference of license from a course of dealing as a private owner would be, and the defendants below were entitled to have the facts constituting that course of dealing submitted with proper instructions to the jury. The view expressed by the Territorial Supreme Court is manifestly erroneous; they say: "That instruction in effect declared that because the government had for a time failed to execute the law in this Territory, that therefore it should never begin to do so." It assumes that the penal statute against cutting timber on government land operates in this Territory.

J. G. SUTHERLAND,
JOHN R. McBRIDE,
Att'ys for Plaintiffs in Error.

SUPREME COURT U.S.
FILED
NOV 17 1881
JAMES H. MCKENNEY, Clerk.

Supreme Court of the United States

No. 99.

DANIEL H. WELLS, WILLIAM LIVINGSTON, and B. B. BITNER, Plaintiffs in Error,

vs.

JOHN NICKELS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR DEFENDANT IN ERROR,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

DANIEL H. WELLS ET AL., PLAINTIFFS IN ERROR, *vs.* JOHN NICKLES, DEFENDANT IN ERROR.	No. 99.

BRIEF FOR THE DEFENDANT IN ERROR.

The statement of facts contained in the plaintiffs' brief, pages 1–4 inclusive, is in the main correct, with the exception of such additional and qualifying facts as we shall state herein as we proceed.

FACTS FOUND BY VERDICT.

I.

Under instruction first given, (R. 53,) in order to find for the plaintiff, as the jury did, it was compelled to find as facts:

1. That all the lumber involved in the action was from timber cut from the government land.

2. That the seizure thereof was by timber agents of the United States charged with the duty of making such seizures.

3. That said lumber was sold to the plaintiff Nickles by these timber agents.

4. That the defendants detained the said lumber from the plaintiff below, defendant here.

These facts this court must accept as facts found by the jury, because under the said charge (R., top of 53) the jury could not find for the plaintiff if these facts were not found by them.

These facts being established as the result of the verdict under the instructions given, there is nothing left in this record to be considered save the questions: (1) Is the stipulation set out on pages 27 and 28 one binding in law upon the timber agents as such, or upon the United States as the owner of the timber, or upon the subject-matter, to wit, said lumber? and (2) Were the records of the three suits named in the assignment of errors admissible as evidence concluding the government's property in the timber?

II.

The Compromise.

The last part of the said charge—(R., top p. 53,) that if the defendants below relied upon a "compromise" by the government timber agents, whereby such agents were disabled from selling to Nickles, then the *onus* of showing such binding "compromise" was on the defendants below—was correct; and that such burden was on defendants below is not disputed in this record. Hence the only defense in the case, based upon the validity of said compromise, depends, for its sufficiency, upon the authority to make said compromise, and the question as to the due performance of the terms thereof by the defendants below. The alleged compromise is found in the record, pp. 27, 28.

That the timber agents nor their attorneys had any au-

thority to make such compromise, and that it is invalid, are established by the following considerations:

First. The stipulation undertook (according to the interpretation of it found in plaintiff's brief, p. 8) to turn the court into an arbitration for the purpose of determining how much the government ought to receive for its timber, and undertook to deprive the court of jurisdiction to consider a demurrer to the petition. This is illegal, even as between private parties. The courts cannot be converted into an instrumentality to be run for the convenience of and according to the stipulations of litigants, regardless of the law giving, and controlling the methods of, their jurisdiction.

Second. The suit in which said stipulation was made is one which discloses in the record (pp. 21–29 inclusive) that it was against Patton & Silva, as officers and agents of the United States, charged with the care of timber of the government, and it was not within the power of such government agents, nor their attorneys, to make a stipulation for the surrender of the timber, or the taking pay therefor, (as was attempted in said stipulation,) nor otherwise than as directed by the instructions of the General Land Office, to wit: By requiring at least "payment of expenses incurred and reasonable stumpage for the timber, to be fixed by the timber agents." (Rec., pp. 18, 19, &c.)

This stipulation attempts to violate this instruction by agreeing to surrender the timber before payment; by agreeing to take no stumpage, should the court so decide; by agreeing to let the court decide what the stumpage should be, instead of the agents deciding it, as required by the instructions.

Third. The stipulation is illegal, in that it is an attempt by the timber agents, through their attorneys, to submit to

the courts the jurisdiction and power to decide upon the government's property rights. In other words, it is a stipulation attempting to make the government a defendant in a lawsuit. This there was not authority of law for the timber agents or their attorneys to do, and none is pretended to be given by statutes or by regulations. On the contrary, it is an attempt, as we have seen, in violation of express instructions.

The case of Carr *v.* The United States, 8 Otto, 433, is an authority deciding not only the foregoing proposition, but also deciding the points that we make below regarding the admissibility of the records set out in the plaintiffs' assignment of errors. (Brief, pp. 4, 5.)

Hence, manifestly, all that is claimed in the assignment of errors, based upon the contention that the court erred in refusing to give the plaintiff in error the benefit of said "compromise," and the benefit of the surrender of said timber thereunder, and the benefit of the fact that it was afterwards seized in contravention of said compromise, falls to the ground.

III.

Rejected Records.

It is assigned for error that the court refused to admit as evidence the following:

1st. The record of the suit brought by Wells, the present plaintiff in error, *v.* Patton, Silva, and others, commenced July 10, 1875. Brief, page 4. (See Rec., pp. 21–29, for the record referred to.)

By reference to this record it will be seen that it was a bill in equity for an injunction against the defendants, as timber agents of the United States, to restrain them as such agents from selling timber seized by them.

To this bill a demurrer was filed August 17, 1875, (Rec., p. 28,) which was sustained July 12, 1876, (Rec., p. 29,) and

the bill was dismissed. In this record appears the stipulation above alluded to.

To this we have to say that it was not competent as evidence in the case—

(A) Because, although the plaintiff in error says he offered to prove that the property in controversy was in large part the same as that described in this equity proceeding, and that he paid the costs and expenses, he did not offer to prove that he paid the stumpage, without which he was not entitled to hold this property. He could not pay for it by giving the bond stipulated for, for no agent had any right to take such bond, and there is no pretense that he ever paid any money. The money he did pay was for "expenses," as shown by the receipt on page 28.

(B) It was incompetent for the further reason that the stipulation was not one binding on the United States, (Carr *v.* The United States, *supra*,) and could not operate to prevent the United States from again seizing the timber for non-payment of stumpage, and selling it, as was done, as will hereafter appear. When seized the second time he might have paid the stumpage and held it, but he chose not to do so, and because of his failure in this respect it was sold to the defendant in error.

There was no judgment in his favor, and if there had been it could not be effective against the United States, or operate to preclude the United States from again seizing the property. The record *per se*, therefore, could have no force as testimony, nor could the stipulation, as an independent paper, have any force for the reasons above given.

2d. It is also assigned for error that the court refused to admit as evidence the record of a suit brought by plaintiff in error against Patton and Greenway. (Brief, p. 5; for this record, see R., p. 29.)

That was a complaint in replevin, filed September 16, 1876, after the demurrer to the bill in equity had been sustained and the bill dismissed.

That record also shows that the property sought to be replevied had been seized by the defendants as timber agents of the United States.

In connection with this record the plaintiff in error offered to prove that the timber involved in that controversy was identical with that in the case then on trial and now here. (Rec., p. 36.)

This offer could not affect the question of the admissibility of the record.

We submit that the papers offered were wholly incompetent as evidence, for the conclusive reason that even if there had been a judgment against the defendants, it would have been void because of the principles of law disclosed in Carr *v.* United States, *supra.* All that is claimed in the opposing brief about these timber agents holding broad and general powers like private agents, is completely answered by reading the instructions, (R. 15–19,) and by the doctrines of this case of Carr.

3d. It is also assigned for error that the court refused to admit as evidence another record.

This was a bill in equity filed on the 27th of September, 1876, (eleven days after the replevin suit was brought,) by plaintiff in error against the same defendants, Patton and Greenway, to enjoin them from selling the property. (Record, p. 37.)

There was no offer to prove that there had been any final decree in the case. Upon filing the bill an injunction was granted against the defendants (p. 40) restraining them from selling the property without the further order of the court, and afterwards the court imposed upon them a fine of $13.45 for having disobeyed that order, (p. 52;) and there was an offer to prove that the property involved was identical with that in this controversy.

What we have said as to the other records is equally applicable to this.

The papers offered show that the property had been seized by the agents of the United States, and that the proceeding was an effort through the territorial court to interfere with these agents in the performance of their duties, which, we repeat, the court was powerless to do; and hence, no matter what the proceedings were in that behalf, they could not be competent evidence in this case.

In Carr *v.* The U. S., 98 U. S., *supra*, this court says: "In some cases (perhaps it was so in the present case) it might not be apparent until after suit brought that the possession attempted to be assailed was that of the government, but *when this is made apparent by the pleadings or the proofs*, the jurisdiction of the court ought to cease. Otherwise the government could always be compelled to come into court and litigate with private parties in defense of its property." And suit was brought by the defendant in error to procure possession pursuant to his purchase at that sale.

We conceive that it is settled that plaintiff in error could not in the courts litigate with the United States in respect of this property. It having been seized by the United States, the latter could hold it as against him; and this being so, it needs no argument to prove that the party who procured it from the United States, through a sale that the latter was by law authorized to make, could also hold it against the party from whom it was seized.

If it be granted that plaintiffs in error might, as against Nickles, show that the alleged compromise (R. 27, 28) was valid, and hence that the court's instruction that the jury in this case had nothing to do with the question of compromise, (R. 53,) taken alone, was too broad, yet it furnishes no ground for reversing the judgment, because the entire record shows the judgment was right. The other parts of the charge showed that the court meant to say, and did say, that the compromise could not affect the case, because it was not pretended that the instructions had been

carried out by payment of "stumpage;" and without *that* there *could* be no compromise.

Any other rule would embarrass, if it did not practically destroy the authority of the government in such cases.

This, we submit, is an answer to the objections made in the assignment of errors to the charges given by the court.

IV.

The plain facts of the case are these:

The timber in question was cut from government lands, and was seized by the agents of the United States. The plaintiff in error undertook to litigate in the territorial court the question of his liability to pay for it. The property was released to him the same day his bill was filed, he stipulating to prosecute the suit with diligence to final judgment, and give bond to pay such sum as the court adjudged. A demurrer was filed to the bill on the 16th of August following, but nothing further seems to have been done in the case until the 12th of July in the following year. There is nothing to indicate that he ever gave this bond, even if it could lawfully have been given. On the 12th of July, 1876, his bill was dismissed, and then the property was again seized. (See Brief, p. 8.) He nowhere pretends that he paid the stumpage. He began his replevin suit against the officers, and then another injunction suit; but the property was sold by the agents of the United States to the defendant in error; and this court has held that in the absence of express legislative authority no officer or agent of the government has power to enter an appearance for the government in any action in the court, or to subject any of its property to such jurisdiction.

This has been often decided in this court before, and also on the circuit, as in United States *v.* Ames, 1 Wood. & Minot, p. 76.

SHELLABARGER & WILSON,
Attorneys for Defendant in Error.

14-450 Field.

Submitted Dec. 12. 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 148.

LORING P. HAWES, APPELLANT,

vs.

THE CONTRA COSTA WATER COMPANY, ANTHONY CHABOT, HENRY PIERCE, ANDREW J. POPE, CHARLES HOLBROOK, JOHN W. COLEMAN, AND THE CITY OF OAKLAND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED DECEMBER 28, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 148.

LORING P. HAWES, APPELLANT,

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THE CONTRA COSTA WATER COMPANY, ANTHONY CHABOT, HENRY PIERCE, ANDREW J. POPE, CHARLES HOLBROOK, JOHN W. COLEMAN, AND THE CITY OF OAKLAND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California.
In equity.

The President of the United States of America, greeting: To Contra Costa Water Company, Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and the City of Oakland.

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first Monday of August, A. D. 1878, to answer a bill of complaint exhibited against you in said court by Loring P. Hawes, who is a citizen of the State of New York, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103rd.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D'p'y Clerk.*

2 *Memorandum pursuant to Rule* 12, *Supreme Court, U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of August next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D'p'y Clerk.*

UNITED STATES MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within subpœna on the 15th day of July, 1878, and personally served the same on the 15th day of July, 1878, by delivering to and leaving with W. A. Walters, president of the city council of Oakland, one of said defendants, personally, a certified copy thereof, at the city of Oakland, county of Alameda, in said district, & on the 16th day of July, 1878, by delivering to and leaving with W. R. Andrus, mayor of the city of Oakland, Jno. W. Coleman, and Anthony Chabot, said defendants named therein, personally, a certified copy thereof, at the city of Oakland, county of Alameda, in said district, and on the 29th day of July, 1878, by delivering to and leaving with W. H. Mead, secretary of the Contra Costa Water Company, said defendant, personally, a certified copy thereof, at the city and county of San Francisco, in said district.

A. W. POOLE, *U. S. Marshal*,
By E. M. HALL, JR., *Deputy.*

3 I hereby certify that I received the within subpœna on the 15th day of July, 1878, and personally served the same on the 16th day of July, 1878, by delivering to and leaving with Andrew J. Pope

and Chas. Holbrook, said defendants, personally, a certified copy thereof, at the city and county of San Francisco, in said district.

A. W. POOLE, *U. S. Marshal,*
By HORACE BACON, *Deputy.*

U. S. MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within subpœna on the 15th day of July, 1878, and personally served the same on the 16th day of July, 1878, by delivering to and leaving with Henry Pierce, one of said defendants, a certified copy thereof, at the city and county of San Francisco, in said district.

A. W. POOLE, *U. S. Marshal,*
By W. L. McEVEN, *Deputy.*

(Endorsed:) Filed August 7th, 1878. L. S. B. Sawyer, clerk, by J F. O'Beirne, d'p'y clerk.

4 *Bill in equity.*

In the circuit court of the United States for the ninth circuit and district of California.

LORING P. HAWES, COMPLAINANT, *vs.* CONTRA COSTA WATER COMPANY, ANTHONY Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and the City of Oakland, defendants.	In equity.

To the judges of the circuit court of the United States for the district of California:

Loring P. Hawes, of the city of New York, and a citizen of the State of New York, brings this his bill against the Contra Costa Water Company, a body politic and corporate organized and during all the times herein alleged being and acting as a corporation under the laws of the State of California, and a citizen of the State of California, and having its principal place of business in the city of Oakland, of said State, and against Anthony Chabot, Henry Pierce, Andrew J. Pope,
5 Charles Holbrook, and John W. Coleman, each and all citizens of the State of California, and also against the City of Oakland, a municipal corporation organized and during all the times herein alleged acting under the laws of the State of California, and a citizen of said State, and of the county of Alameda, in said State. And thereupon your orator complains and says, that this suit is brought on behalf of himself and all other stockholders of the said Contra Costa Water Company who may choose to come in and contribute to the cost and expenses of this action.

2. And your orator avers that on or about the thirteenth day of June, A. D. 1866, the defendant the Contra Costa Water Company became and ever since has continued to be a body politic and corporate duly organized under the acts of the legislature of the State of California, entitled respectively "An act to provide for the formation of corporations for certain purposes," approved April 14th, A. D. 1853, and "An act for the incorporation of water companies," approved April 22nd, A. D. 1858, and the act supplementary thereto and amendatory thereof;

that said company was organized for the purpose of supplying the cities and towns in the county of Alameda, in said State of California, and the inhabitants thereof, with pure fresh water; that its capital stock was two hundred and fifty thousand dollars, consisting of twenty-five hundred shares of the par value of one hundred dollars each, and
6 the period of its existence fifty years from & after said thirteenth day of June, A. D. 1866; that its office and principal place of business is located at the city of Oakland in said county; that said individual defendants herein above named are the trustees and directors, & only trustees and directors of said Contra Costa Water Company; that the capital stock of said company has been duly and lawfully increased since its first organization to three million dollars, consisting of thirty thousand shares the par value of one hundred dollars each.

3. And your orator avers that the defendant the City of Oakland is and during the times herein referred to has been a municipal corporation (being a city) duly organized and existing under and by virtue of an act of the legislature of said State, entitled "An act to incorporate the city of Oakland," approved March 25th, A. D. 1854, and the acts supplementary thereto and amendatory thereof, and that said city of Oakland is in the county of Alameda, in said State.

4. And your orator avers that, at the request of the defendant the Contra Costa Water Company, the lawful authorities of said city of Oakland, in that behalf duly empowered, passed a certain ordinance granting to said Contra Costa Water Company the right to lay down water pipes in the said city of Oakland, a copy of which ordinance is hereunto annexed, marked Exhibit A, and made part of this bill of complaint, and the said water company duly accepted the said ordi-
7 nance, and by virtue thereof and its powers and privileges under the laws of the State of California did bring and introduce into said city of Oakland, and supply the same and the inhabitants thereof with pure, fresh water, and is still introducing and supplying said water to said city and its inhabitants. And said water company has in all things, as your orator avers on his information and belief, fully complied with all the matters and things on its part and behalf to be done and performed as required by the said ordinance and the laws of California.

5. And your orator avers that the said city of Oakland claims the right to have and receive from the works of said water company to the extent of its means within the limits of said city water free of compensation for all municipal purposes whatever, including all water necessary for watering its streets, public squares, and parks, for flushing sewers and for like purposes, and generally for all municipal purposes excepting only such supplies (as are termed usually "family uses") to those of the inhabitants to whom it is the duty of said city to provide, such as prisoners and the occupants of charitable and educational institutions. And your orator avers on his information and belief that the trustees and directors of the said water company are furnishing to the said city of Oakland, and permitting it to take, and said city is now taking from the water & works of said water company free of charge and without any compensation, large amounts of water daily
8 for most if not all of said purposes aforesaid except for said family uses, and that the said directors and trustees of said water company are not limiting its supply of water to said city free of charge to the case of fire or other great necessity, and that the said acts of the said city and of said directors and trustees of said water com-

pany greatly diminishes the income of said company, reduces the dividends to stockholders, and impairs the value of said stock.

6. And your orator avers that, pursuant to the said act of the legislature of said State of California entitled, "An act for the incorporation of water companies," approved April 22nd, A. D. 1858, and prior to the 26th day of July, A. D. 1877, a board of commissioners was duly selected to determine the rates to be charged for the water of the said Contra Costa Water Company, and that board after such selection duly assembled and assumed the duties appertaining to their said offices, & thereupon afterwards and upon the said 26th day of July, A. D. 1877, the said board of commissioners did determine, fix, and adopt the rates to be charged by said water company for water, which rates cover and embrace all the cases of the use of water by said city of Oakland, except in case of fire, and said determination of said board fixing said rates has ever since remained and still remains in full force and effect, and no new rates have since said date last aforesaid been established. And your orator avers that he is and
9 for a long time last past has been a stockholder of said water company, owning five hundred and twenty (520) shares of the capital stock thereof, and that heretofore, to wit, on the 10th day of July, A. D. 1878, he applied to the president and board of directors or trustees of said water company and requested them to desist from their illegal and improper practices aforesaid & to limit the supply of water, free of charge, to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation, but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge for all municipal purposes as has heretofore been done, and to cases other than in case of fire or other great necessity, except as for the family uses hereinabove referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered and will by a continuance of said acts hereafter suffer great loss and damage.

Wherefore may it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America to be directed to the said Contra Costa Water Company, the said City
10 of Oakland, said Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and *said City of Oakland* thereby commanding them and every of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court and then and there to answer all and singular the premises and to stand to perform and abide such order and decree herein as to your honors shall seem meet; and that it shall be established by the decree of this honorable court that said Contra Costa Water Company is not bound to furnish water to the city of Oakland for any municipal purpose whatever, except in case of fire or other great necessity, free of charge, and that said city has no right to take or receive from said Contra Costa Water Company any water for the purpose of watering its (said city's) streets, public squares or parks, or for flushing its sewers, or for any like municipal purpose without paying to said company a compensation therefor according to the rates fixed by the said board of commissioners, and such purposes referred to do not constitute a case of fire or other great

necessity, and that in the mean time and pending this suit the said Contra Costa Water Company and said Chabot, Pierce, Pope, Holbrook, and Coleman, trustees and directors of said water company, and their successors, agents, and workmen, be enjoined and restrained from furnishing to said city of Oakland free of charge, and that said city of Oakland and its officers be enjoined from taking without paying therefor at the rates fixed by the board of commissioners in that behalf
11 selected, any water of said Contra Costa Water Company for the purpose of watering the streets of said city of Oakland or its public squares or parks, or for flushing its sewers, or for any like municipal purpose whatsoever, and that on the final hearing of this case said injunction be made perpetual.

And that your orator may have such further or other relief as the nature and circumstances of this case may require and to the court may seem meet.

WILSON & WILSON,
Solicitors for Complainant.

S. M. WILSON,
Of Counsel.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Samuel M. Wilson, of lawful age, being duly sworn on behalf of the complainant Loring B. Hawes in the foregoing and annexed bill of complaint, deposes and says that he has read the said bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to such matters that he believes the same to be true; and he further says that said Hawes is not a resident of the State of California & is now absent from said State and resides in the city & State of New York and that this affiant is the solicitor
12 and agent of said complainant in matters pertaining to this suit and that for these reasons this verification is made by this affiant and not by said complainant.

S. M. WILSON.

Subscribed and sworn to before me this 15th day of July, A. D. 1878, at said city and county of San Francisco.

[SEAL.] JAMES MASON,
Notary Public.

Exhibit A referred to in the bill of complaint.

An ordinance granting to the Contra Costa Water Company the right to construct water-cart hydrants in the city of Oakland.

The council of the city of Oakland do ordain as follows:

SECTION 1. The Contra Costa Water Company are hereby granted the right and privilege to construct water-cart hydrants immediately in the rear of fire hydrants or in other places in the city of Oakland in such number as shall be necessary for the use and convenience of parties watering the streets in supplying their water carts with water.

SECTION 2. The said Contra Costa Water Company in constructing the hydrants named in section 1 of this ordinance shall replace all earth sidewalks, macadam, or other material which shall be necessary to be removed in constructing said hydrants to the official line & grade
13 and in as good condition as before the same was removed, and

the same shall be done under the supervision of the city marshal and city engineer, and to their satisfaction.

SECTION 3. This ordinance shall take effect and be in full force on and after its approval.

Passed June 24th, 1872.

E. H. PARDEE,
Pres. of Council.

Approved June 27th, 1872.

N. W. SPAULDING.
Mayor.

(Endorsed:) Filed July 15th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y clerk.

14 *Stipulation that bill of complaint may be amended.*

In the circuit court of the United States for the ninth circut ddin isatrict of California.

LORING P. HAWES, COMPLAINANT, *vs.* THE CONTRA COSTA WATER COMPANY ET AL., defendants.	No. 1941.

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the bill of complaint in the above entitled cause may be amended by attaching thereto a copy of the document hereto annexed in the place and stead and in lieu of the instrument annexed to said bill of complaint, marked Exhibit A, and that when so attached the said document shall be deemed to be and taken as the Exhibit A referred to and made a part of said bill of complaint as if originally attached thereto.

Dated August 17th, 1878.

VROOMAN AND DAVIS,
Solicitors for Defendant the City of Oakland.

15 An ordinance granting to the Contra Costa Water Company the right to lay down water-pipes in the city of Oakland.

The council of the city of Oakland do ordain as follows:

SECTION 1. The right to lay down distributing water-pipes in any of the streets, alleys and lanes of the city of Oakland is hereby granted to the Contra Costa Water Company, its successors and assigns, for the purpose of introducing fresh water for the supply of the inhabitants of said city: Provided, That within eighteen months after the passage of this ordinance there shall be not less than three thousand feet of said water-pipe laid within the limits of said city and a supply of fresh water provided for distribution through the same to the party or parties agreeing to pay for the same so long as the supply permit.

SECTION 2. The streets, alleys and lanes used for the purpose aforesaid shall be left in as good condition as they are in before said pipes are laid.

SECTION 3. Should any other corporation or corporations, person or persons, hereafter procure the right to introduce fresh water in said city upon better terms than herein granted, such better terms shall inure to and be enjoyed by the said Contra Costa Water Company, its successors or assigns.

16 SECTION 4. No other person or persons, corporation or corporations, shall have the right to lay pipes within three feet of the pipes of the grantee herein except at the crossings of said pipes.

SECTION 5. The city shall have the right to erect at its own expense hydrants at any points along the line of said pipes, and to connect the same with said pipes.

SECTION 6. This ordinance shall take effect and be in full force from and after its passage and approval.

Passed July 18th, 1866.

F. K. SHATTUCK,
Pres't pro tem.

Approved July 22nd, 1866.

JOHN W. DWINELLE,
Mayor.

Attest,
A. D. EAMES, *City Clerk.*

(Endorsed:) Filed August 19th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y clerk.

17 *Demurrer of City of Oakland.*

In the circuit court of the United States, ninth circuit, district of California.

LORING P. HAWES, COMPLAINANT, *vs.* CONTRA COSTA WATER COMPANY, ANTHONY Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and the City of Oakland, defendants.	In equity.

The demurrer of the defendant the City of Oakland.

This defendant the City of Oakland, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged doth demur to said bill and for cause of demurrer shows:

1. That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him in a court of equity to any such relief as is thereby sought and prayed for, or to any relief, as against this defendant, as to the matters contained in said bill or any of such matters.

18 2. And for further cause of demurrer the said defendant showeth: That the said complainant has not legal capacity to bring this suit, in this, to wit, that it appears by said bill of complaint that if any cause of action exists by reason of the matters therein stated, such cause of action is in favor of the defendant the Contra Costa Water Company only, and it does not appear by said bill that this complainant has requested or required the defendant the Contra Costa Water Company, or the board of directors thereof, or either of them, to bring this or any other suit touching the matters complained of in said bill, or that upon such requirement or request the said Contra Costa Water Company, or the directors thereof, have refused so to do.

Wherefore this defendant the City of Oakland prays the judgment

of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and asks to be hence dismissed with its reasonable costs in this behalf sustained.

VROOMAN & DAVIS,
Solicitors for Defendant the City of Oakland.

LATIMER, MORROW AND PROFFATT, *Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

L. D. LATIMER,
Of counsel for said Defendant the City of Oakland.

19 STATE OF CALIFORNIA,
County of Alameda, ss:

W. R. Andrus, being duly sworn according to law, deposes and says that he is the mayor of the city of Oakland, the defendant demurring herein, and is the chief executive officer of said city, and that the foregoing demurrer is not interposed for delay.

W. R. ANDRUS.

Subscribed and sworn to before me this 31st day of August, 1878.

STEPHEN G. NYE,
Judge of the County Court of the County of Alameda, in the State of California.

Service of a copy of the within demurrer is hereby admitted this 22d day of September, 1878.

WILSON & WILSON,
Solicitors for Complainant.

(Endorsed:) Filed September 22d, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y clerk.

20 *Enrollment.*

At a stated term of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court room thereof, in the city and county of San Francisco, district aforesaid, on Wednesday, the 30th day of October, A. D. 1878.

Present, honorable Lorenzo Sawyer, circuit judge.

LORING P. HAWES
vs.
CONTRA COSTA WATER COMPANY ET AL.

The complainant, Loring P. Hawes, filed his bill of complaint, which is hereto annexed, on the 15th day of July, A. D. 1878. Thereupon a subpœna was issued returnable on the first Monday of August, A. D. 1878, and personal service thereof made upon each and all of the defendants herein prior to said return day. Said writ of subpœna, with the marshal's return thereon endorsed, is hereto annexed.

The defendant the City of Oakland appeared herein by Messrs. Vrooman & Davis, solicitors, and Latimer, Morrow & Proffatt, of counsel.

21 On the 8th day of August, A. D. 1878, the default of the defendants Anthony Chabot, John W. Coleman, Andrew J. Pope, Charles

Holbrook, and Henry Pierce were duly entered for failing to appear in this suit.

On the 19th day of August, A. D. 1878, a stipulation that the bill of complaint herein might be amended was filed, which stipulation is hereto annexed.

On the 2nd day of September, A. D. 1878, the defendant the City of Oakland filed its demurrer to the bill of complaint, which demurrer is hereto annexed.

On the 11th day of September, A. D. 1878, the default of the defendant the Contra Costa Water Company for failure to enter its appearance herein was duly entered.

Thereafter, this cause having come on to be heard upon the bill of complaint & demurrer thereto aforementioned, a final decree was duly signed, filed, and entered herein, which decree is in the words and figures following, to wit:

At a stated term of the circuit court of the United States of America for the district of California, held at the court room, in the city and county of San Francisco, on Wednesday, the 30th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.
Present, the honorable Lorenzo Sawyer, circuit judge.

22 *Final decree.*

LORING P. HAWES
vs.
CONTRA COSTA WATER COMPANY ET AL. } No. 1941.

This cause having come on to be heard at the present (July, A. D. 1878) term of this court upon a demurrer to the bill of complaint, and having been submitted to the court, and the court, after due deliberation, having ordered that said demurrer be sustained and said bill be dismissed, thereupon, upon due consideration thereof, it is ordered, adjudged, and decreed, that the bill of complaint herein be dismissed, and that complainant pay defendants their, the said defendants, costs in this behalf expended to be taxed.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

(Endorsed:) Filed and entered Oct. 30th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y clerk.

23 *Memorandum of costs and disbursements.*

UNITED STATES OF AMERICA:

In the circuit court of the United States of the ninth circuit in and for the district of California.

LORING P. HAWES *vs.* THE CONTRA COSTA WATER COMPANY and others.	Memorandum of costs and disbursements on the part of the defendant the City of Oakland.

DISBURSEMENTS.

Clerk's fees	$42 80
Attorney's docket fee	20 00
	$62 80

Taxed at $30.

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

UNITED STATES OF AMERICA,
District of California, City and County of San Francisco, ss:

L. D. Latimer, being duly sworn, deposes and says: That he is one of the counsel for the defendant the City of Oakland in the above entitled cause, and as such is better informed relative to the above costs and disbursements than the said City of Oakland. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements
24 have been necessarily incurred in the said cause.

L. D. LATIMER.

Subscribed and sworn to before me this 4th day of November, A. D. 1878.

JOS. F. O'BEIRNE,
Commissioner U. S. Circuit Court, &c.

(Endorsed:)

To WILSON & WILSON,
Solicitors for Complainant:

You will please take notice that on Wednesday, the 6th day of November, A. D. 1878, at the hour of 11 o'clock a. m., we will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

VROOMAN & DAVIS, *Solicitors,*
& LATIMER, MORROW, AND PROFFATT,
Counsel for Defendant the City of Oakland.

We acknowledge due service upon us of a copy of the within memorandum of costs and disbursements and the foregoing notice this 4th day of November, 1878.

WILSON & WILSON,
Solicitors for Complainant.

(Endorsed:) Filed this 4th day of November, A. D. 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

25 Thereupon said pleadings, subpœna, stipulation, final decree, and memorandum of taxed costs are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, &c.:

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D'p'y Clerk*.

(Endorsed:) Enrollment filed November 4th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y clerk.

26 *Opinion.*

United States circuit court, ninth judicial circuit, district of California.

HAWES
vs.
CONTRA COSTA WATER CO. ET AL.

1. STATE STATUTES—AUTHORITATIVE CONSTRUCTION.—The construction by the highest court of a State of a statute of the State which does not trench upon any of the powers of the national government, or upon any right guaranteed or protected by the Constitution of the United States, is authoritative and conclusive in the national courts.

2. OBITER DICTUM.—Where the record in an action of which the court has jurisdiction fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be regarded as an obiter dictum, and the judgment is authoritative on both points.

3. WATER COMPANIES—STATUTE CONSTRUED.—Under the clause of the statute of California authorizing the formation of water companies to supply cities with pure water, which requires the corporation to supply water free of charge for extinguishing fires, and other great necessities, corporations organized thereunder, after supplying certain preferred uses, are bound, to the extent of their means, to furnish the cities supplied with water free of charge, for irrigating public parks and squares, flushing sewers, and for all other municipal purposes, except for family and analogous uses.

27 Sawyer, circuit judge.

This is a bill in equity by a stockholder of the Contra Costa Water Company, a corporation formed under the act of 1858 to supply the city of Oakland and other places with pure water, against the corporation, its officers, and the City of Oakland, to restrain said corporation from furnishing, and said city of Oakland from taking water without charge for watering public squares, parks, or for flushing sewers, or other like municipal purposes. The City of Oakland demurs to the bill. The only question presented on the merits arises upon the construction of a provision in the fourth section of the act of 1858, under which the water company was organized, which, after giving precedence to certain specified uses, provides that corporations organized under the act "shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, without charge." (Stat. Cal. 1858, 219.) The question is, whether the water company under the words "other great necessity" is bound to furnish without charge water for irrigating public squares and parks, flushing sewers, and other like municipal purposes. The counsel for the City of Oakland insists that the construction of this act has been settled in

favor of the city by the supreme court of California; and that this construction by the highest court of the State of a statute of the State is controlling in the national courts. They rest upon this construction, and decline to regard the question as an open one, or to argue the
28 point as an original proposition. This being a State statute in no way trenching upon any of the powers of the national government, or any rights guaranteed or protected by the Constitution of the United States, a construction by the highest court of the State would be controlling and conclusive in the national courts, as has often been held by the Supreme Court. (Walker vs. State Harbor Commissioners, 17 Wal. 650; Bailey vs. Maguire, 22 Wal. 230-1; Christy vs. Pridgeon, 4 Wal. 196; Leffingwell vs. Warren, 2 Black, 603; South Ottowa vs. Perkins, 4 Otto, 260.) The complainant insists that the construction relied on by the defendant is but a dictum, or if otherwise, that the supreme court had decided the same point the other way in a prior case, and that this court is authorized to exercise its own judgment in the matter, the point not being yet settled by the State courts. It therefore becomes necessary to inquire whether there has been an authoritative construction by the State courts of the words "other great necessity." The first case cited is The City and County of San Francisco vs. The Spring Valley Water Works. (39 Cal. 473.) This was an action by the city of San Francisco against a corporation organized under the same act to supply San Francisco with water, in which the complainant, the City of San Francisco, sought to restrain the defendant from cutting off the city from the use of water without charge from watering the public plazas and all municipal uses other than extinguishing fires. The district court sustained a demurrer and dismissed the bill. In that case,
29 the discussion and decision in the supreme court turned upon the language of another act, passed at the same session, granting certain rights to George Ensign and others, and known as the "Ensign act," (Stat. 1858, 254,) the rights under said act having become vested in the defendant in the action. The supreme court held that the rights of the parties must be determined by the provisions of the Ensign act; and that under its provisions, which are different from those now in question, the defendant was only obliged to furnish water free of charge for the purpose of extinguishing fires until water should be introduced by some other party; and as it did not appear that any other party had introduced water, it was only required to furnish water free of charge to extinguish fires. Had this been all there was in the bill, the judgment of the district court would, doubtless, have been affirmed. But the bill, also, set up as matter of estoppel facts showing that the rights of the parties had been adjudicated against defendant in a former action. The court held this matter to be well pleaded and, if true, to constitute a valid estoppel, and apparently, on that ground, held that the demurrer should have been overruled. The judgment on this point was accordingly reversed with directions to overrule the demurrer. But since there was an answer filed with the demurrer denying the matter of estoppel, the order denying a temporary injunction was affirmed. There was no construction whatever of the language of the act now in question, nor does it appear to have been considered or discussed by either court or counsel. The case having been remanded to the district
30 court, and the complaint having been amended so as to show that water had in fact been introduced by another corporation, the San Francisco City Water Works, whose rights had been assigned to defendant, another trial was had, and judgment again rendered for defendant, and a second appeal taken. On the first appeal, and on the

first hearing of the second appeal, "it was assumed by court & counsel that the rights and obligations of the defendant were to be ascertained by reference to the act of April 23, 1858"—the Ensign Act (San Francisco vs. S. V. W. W., 48 Cal., 509, 514.) A rehearing having been granted, the opinion delivered on the first hearing of the second appeal is not reported. But on the rehearing a new point was made that the Ensign Act, upon which the former decisions turned, was unconstitutional and void; and this point the court sustained in an elaborate opinion. The defeated party not being satisfied, another petition for rehearing was filed; and the court again at the following term discussed the point at length in denying the petition—two of the justices delivering opinions maintaining the unconstitutionality of the act, and one justice a dissenting opinion. In these opinions the only points discussed are the unconstitutionality of the Ensign Act; and the point that conceding it to be unconstitutional, the defendant was still liable to supply water without charge for all municipal purposes, except "sprinkling streets," as successor of the "San Francisco City Water Works," under the city ordinances by which that corporation acquired its rights. The court did not discuss the meaning of the
31 clause in the general act, "in case of fire or other great necessity," nor do counsel appear to have discussed the meaning of that clause. At the conclusion of the opinion on the rehearing, it is said it is true that "tested by the general law under which the defendant was organized it is under no obligation to furnish water to the city and county free of charge, except for the extinguishment of fires during the pending thereof." The learned justice must have labored under some misapprehension here, for the phrase "for the extinguishment of fires during the pendency of the same" is not in the general statute, but in the Ensign Act (Stat. 1858, 255, sec. 3), the statute held to be unconstitutional. The clause in the general act is "in case of fire or other great necessity" (Ib., 219, sec. 4). But be this as it may, there is here no attempt to define the words "other great necessity." In the second opinion of the same learned judge—the opinion on denying the second petition for rehearing—the words "in case of fire or other great necessity" are casually referred to in discussing the point as to the liability of the defendant under the former city ordinances as successor of the San Francisco City Water Works. But no attempt is made to construe them (48 Cal., 525). The only other allusion to the phrase is by Mr. Justice McKinstry in his concurring opinion; and apparently for the purpose of cutting off any pretense that might afterward be made that the court had construed the clause. He says: "I express no opinion as to the precise meaning of the phrase 'other great necessity.' On the former appeal, and before I came to the bench, it was held
32 by all the justices qualified to sit in this case that these words did not include every municipal purpose. I shall assume that the construction given by the court is correct." (48 Cal., 531.) I do not myself find any such express holding in the reported opinion on that appeal, or any allusion whatever to the clause. The justices probably entertained that opinion, but may not have found it necessary to express it in view of the point upon which the decision was rested. It is now insisted by the complainant, that since the judgment of the district court was affirmed the judgment necessarily determines that the words "other great necessity" do not embrace the municipal uses now being supplied to the city of Oakland free of charge, as stated in the bill. It is evident from what has already been said, that the court did not intend to give a specific construction to the clause "other great neces-

sity." This inference arises from the questions actually discussed by both counsel and court, and the points expressly decided. Besides, that idea is expressly excluded by the language of Mr. Justice McKinstry. The matter, it must be confessed, is left in a somewhat uncertain condition, technically speaking; but upon a careful consideration of the several cases as reported the following seems to be the result: The city sought to restrain the water company from cutting off water free of charge for all municipal purposes except extinguishing fires, and this was the question litigated; while the court was of opinion that there were some municipal purposes for which defendant was entitled to charge, and on that ground held the city not entitled to the in-
33 junction sought, without determining for what specific purposes a charge might be made, or for what specific purposes other than extinguishing fires water must be furnished free of charge, that question not having been presented by counsel in their numerous & voluminous arguments. And so the court itself held when the question was next presented in the case which will now be considered. After the decisions in these cases the Spring Valley Water Works threatened to shut off water before then supplied for watering plazas and like municipal uses, and the board of supervisors passed a resolution empowering and directing the mayor in that case to make connections with the pipes of the water company wherever water should be required for municipal purposes; and an ordinance was introduced with similar and further provisions, and passed to print. Whereupon the Spring Valley Water Works presented a petition to the supreme court, alleging that it was only bound to supply water free of charge for extinguishing fires, and setting up the prior litigation before considered, claiming that the judgment in said case settled the rights of the parties in favor of the company, and that the matter was res adjudicata; also the subsequent acts of the board of supervisors, including the threatened passage of the ordinance so introduced; and praying a writ of prohibition. The decision has not yet been reached in the official series of the California Reports, and I cite from the copy reported in the Pacific Law Reporter, vol. 14, page 218. A certified copy of the petition and the printed arguments of counsel in the case have been furnished
34 me. In deciding the case the court briefly hold that the writ of prohibition retains its character in the nature of a prerogative writ to be issued in the sound direction of the court, and that in this case it would not be a proper exercise of discretion to issue it. The opinion of the court then proceeds as follows:

"The parties have requested the court to place an interpretation upon the language of the fourth section of the act of 1858, which is as follows: 'And shall furnish water to the extent of their means to such city and county, or city, or town, in case of fire, or other great necessity, free of charge.' It is claimed by petitioner that it has been adjudged by this court that the city and county is not entitled to water from the pipes and mains of petitioner 'free of charge' for any municipal purpose, except for the extinguishment of fires; that such is the effect of the judgment in San Francisco vs. Spring Valley Water Works (48 Cal. 493). A reference to the report of that case will show that the question discussed in the briefs, and the only questions considered in the opinions of the justices, was the validity or constitutionality of the 'Ensign Act.' It seems to have been assumed by counsel and court that a determination that the 'Ensign Act' was void must involve a complete reversal, and not a modification of the judgment of the district court. Counsel did not then indicate their respective views (in case it should be held that water corpo-

rations were not compelled to furnish water for all purposes) as to the purposes for which the company might charge for the water and as to the purposes for which it might be compelled to furnish water free
35 of charge. It is said, however, that inasmuch as the complaint was filed by the city and county to enjoin a threat on the part of the Spring Valley Water Company to cut off water for all purposes, except in case of fire, and as judgment was rendered for defendant, such judgment necessarily involved a determination that the company was entitled to refuse to furnish water free of charge for any other purpose than the extinguishment of fires. It is plain from the opinions therein rendered that no such result was contemplated by the judges. In the opinion, on rehearing, of Mr. Justice Crockett, concurred in by Mr. Justice Niles, and in this particular by Mr. Justice Rhodes, the obligation of the Spring Valley Water Works is described as being an obligation to furnish water free of charge 'in case of fire or other great necessity' (page 527). And Mr. Justice McKinstry, in his concurring opinion (page 531), says: 'The general law required all water companies to furnish water to the extent of their means, and free of charge, to the city or town to which water was conducted in case of fire or other great necessity.' I express no opinion as to the precise meaning of the phrase 'other great necessity.' On the former appeal, and before I came to the bench, it was held by all the justices qualified to sit in this case that these words did not include every municipal purpose.

"Under these circumstances, even if the technical effect of the judgment in San Francisco vs. Spring Valley Water Works is broader than the views expressed by the justices would warrant, I am of opinion that the case should be held to be authority only to the extent of a
36 determination that the company is not bound to furnish water to the city free for all purposes. But the claim of the city and county, in the action of the City and County of San Francisco vs. The Spring Valley Water Works, was based on an assertion that the rights and duties of the defendant, so far as furnishing water to the city is concerned, was created and controlled by the Ensign Act, and by the transfer from the city water works to the Spring Valley Water Works; and that by virtue of said act and transfer the obligation was imposed on the Spring Valley Water Works to furnish water for all purposes. The pleading on the part of the plaintiff did not allege that there were any 'great necessities' for which the water should be furnished free, and in the absence of such allegation, the judgment of the court only determined that the city and county was not entitled, as it claimed, to free water for all purposes. The decision and judgment did, however, determine that the defendant was bound to furnish water to the city and county free of charge 'in case of fire or other great necessity.' The meaning of these words is still an open question." (14 Pacific Law Reporter, 219.)

Thus the court construes its own prior decisions, and declares that it did not intend to give an authoritative construction on the disputed point.

The court then proceeds to construe the phrase "other great necessity," in connection with the other provisions of the act, and distinctly holds that to the extent of its means "it is the duty of the Spring Valley Water Works to furnish water free to the city and county in
37 case of fire, and also in case it is demanded for irrigating the parks and squares, watering streets, flushing the sewers, and in case of any other demand based on a requirement which is incidental to the discharge by the supervisors of their duty as local legislators, except when it is to be used by human beings for family purposes"; but

that said company "may charge the ordinary rates (when they shall have been fixed in the manner required by the general law) for water supplied for drinking and culinary purposes; for purposes of lavation, and for domestic uses to the inhabitants or occupants of various institutions, penal or charitable, established by or under the control of the city and county government, to the public schools, and to the public offices." (Ib. 220). But it is now insisted that this construction is obiter dictum, and therefore of no controlling force, because the court having determined that there was no proper case for the issue of a writ of prohibition, it was not authorized to go further and determine the merits. I know of nothing to prohibit the court from determining every point that is properly presented by the record where it has jurisdiction of the case. The question as to the propriety of issuing the writ was not jurisdictional. The court had authority to issue the writ in a proper case, as it has to issue an injunction or to cancel a deed in a proper case; and the question was, not whether the court had jurisdiction to issue a writ of prohibition, but whether the petition presented a proper case for its exercise.

38 There were two grounds relied on to show that there was not a proper case for exercising the jurisdiction:

1. That the board of supervisors is a legislative body having a discretion to pass ordinances, and that the court ought not to interfere with its legislative discretion in advance on the hypothesis that it intends to pass an illegal ordinance, especially when it cannot be known in advance what its intention as a legislative body is.

2. That the city had a right to the water claimed, & a right to take the measures alleged to secure it in case the petitioner should shut it off, and for that reason, also, there was not a proper case for the prohibitory writ.

Both grounds were distinctly and squarely presented by the record, and relied on, and the latter more especially fully argued by counsel. The court might just as well have rested its decision on the second ground, if found good, without noticing the first, as upon the first without noticing the second. Or it might, if thought proper, have decided both, as it did. It is a matter of almost everyday occurrence that the record presents two or more points, either of which, if sustained, would determine the case, and the court decides them all. In such case it can no more be said that one rather than the other is obiter. In this case the court was earnestly pressed by counsel on both sides to decide the case on the merits, and give an authoritative construction of the statute. The great anxiety was to ascertain the rights of the respective parties, and the mode was of no consequence. In fact, the great burden of the arguments of counsel was on the construction of the

39 statute, and the court elaborately considered this one point, two justices discussing it fully in separate opinions, and saying very little on the other, one of them not referring to it at all. It was the very point upon which the earnest struggle hinged. It was the point most distinctly and thoroughly considered by the court; and it was distinctly and expressly determined. After the decision three elaborate printed arguments were filed in support of a petition for rehearing upon the second point by some of the ablest counsel in the State—one of seventy-one, on' of thirty-two, and one of twenty-four closely printed pages—one of the arguments being by counsel representing the individual stockholders, who appeared as amicus curiæ. All of these discussions were upon the merits, the rights of the parties under the statute, the first point only being mentioned by the counsel, in one of the arguments at the

close, where, after finding the decision to be against their claim, they ask the court that a rehearing be granted in order that all the decision saving that relating to the remedy might be withdrawn, leaving open the other questions on the construction for future discussion. Counsel in that case certainly did not regard the construction of the statute as obiter. The court denied the rehearing, and the decision stands as the solemn judgment of the court. The other point received and required very little attention from court or counsel. To say now that the construction of the statute was merely obiter, is to say that a vast amount of labor, research, energy, and anxiety was expended by counsel
40 and court to no useful purpose.

Speaking of dicta in Cohens vs. Virginia, Chief Justice Marshall says: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all cases is seldom completely investigated." (6 Wheat., 399.) In the present instance the court did not go beyond the record, for the construction of the statute was distinctly presented by the record as one point for decision. "The question" was "actually before the court;" "investigated with care, and considered in its full extent." It was the very point upon which nearly all the efforts and research of counsel and court were actually expended. The discussion did not in any sense serve to illustrate the other point. Indeed, it had no relation whatever to it. It was a distinct, separate, and independent point, and the only one in the case that counsel or parties practically cared anything about. The form of the proceeding was merely the means to reach the end sought—of determining the rights of the parties
41 under the act. The case comes fully up to the requirements indicated by Chief Justice Marshall to constitute an authoritative decision.

In answer to an objection that a point determined by the supreme court, relied on by the opposing party, was a mere dictum, I had occasion to say in Starr vs. Stark (2 Sawy., 639): "Both points are fairly and directly presented by the record, and the decision might as well have been put upon one as the other, and both are distinctly determined. We can, therefore, no more say that one was not directly adjudicated than the other."

I regard the construction put upon the clause in controversy by the supreme court, in the prohibition case cited, as authoritative, and being so, I rest my decision upon that case, without examining the question as an original proposition.

It follows that the demurrer must be sustained, and the bill dismissed, and it is so ordered.

October 30, 1878.

S. M. Wilson, for complainant.
L. D. Latimer and Vrooman & Davis, for defendant.

Read in open court and filed this 30th day of October, 1878.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D'p'y Clerk*.

42 *Order granting appeal.*

At a stated term of the circuit court of the United States of America, for the District of California, held at the court-room in the city and county of San Francisco, on Tuesday, the fifth day of November, in the year of our Lord one thousand and seventy-eight.

Present, the honorable Lorenzo Sawyer, circuit judge.

LORING P. HAWES
vs.
CONTRA COSTA WATER COMPANY ET AL.

And now, at this day, on motion of S. M. Wilson, esquire, of counsel for complainant, it is ordered that an appeal to the Supreme Court of the United States of America from the decision rendered and decree entered in the above entitled cause on the 30th day of October, A. D. 1878, of the July term, A. D. 1878, of this court, be and the same is hereby allowed; and that a certified copy of the pleadings and proceedings be forthwith transmitted to the said Supreme Court upon the appelant giving a bond in the sum of five hundred dollars.

43 *Bond on appeal.*

In the Supreme Court of the United States of America.

LORING P. HAWES, APPELLANT
vs.
CONTRA COSTA WATER COMPANY, ANTHONY Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and the City of Oakland, appellees.

Know all men by these presents that we, Hiram Tubbs and E. C. Sessions, are held and firmly bound unto Contra Costa Water Company, Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and the City of Oakland in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said named persons, their successors, executors, administrators, or assigns; for which payment well and truly be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the seventh day of November, A. D. one thousand eight hundred and seventy-eight.

44 Whereas the above named Loring P. Hawes has taken an appeal to the Supreme Court of the United States of America, to reverse the decree rendered by the circuit court of the ninth judicial circuit in and for the district of California, in the suit entitled Loring P. Hawes, complainant, against Contra Costa Water Company, Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, and the City of Oakland, defendants:

Now, the condition of this obligation is such, that if the above named Loring P. Hawes shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

HIRAM TUBBS. [SEAL.]
E. C. SESSIONS. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. W. SESSIONS.

UNITED STATES OF AMERICA,
District of California, ss:

Hiram Tubbs and E. C. Sessions, being severally duly sworn, depose and say, and each for himself deposes and says, that he is one of the sureties to the foregoing bond; that he is a resident and freeholder within the said district; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of
45 his property which is exempt from levy and sale on execution.

HIRAM TUBBS.
E. C. SESSIONS.

Sworn to this 7th day of November, A. D. 1878.
[SEAL.] JOHN W. SESSIONS,
Notary Public.

(Endorsed:)
I approve of the form of the within bond and the sufficiency of the sureties.
San Francisco, November 8, 1878.
(S'g'd) LORENZO SAWYER,
Circuit Judge.

Filed November 8, A. D. 1878, L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

46 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing forty-five written pages, numbered from 1 to 45 inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States of America.

Witness my hand and the seal of said circuit court this 26th day of November, A. D. 1878.
[SEAL.] L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE. *D'p'y Clk.*

(Indorsement on cover:) No. 148. Loring P. Hawes, appellant, vs. Contra Costa Water Company, Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, John W. Coleman, & the City of Oakland. California C. C. U. S. Filed 28th December, 1878.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 148.

LORING P. HAWES, Appellant,

vs.

THE CONTRA COSTA WATER COMPANY, ANTHONY CHABOT, HENRY PIERCE, ANDREW J. POPE, CHARLES HOLBROOK, JOHN W. COLEMAN, and THE CITY OF OAKLAND, Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

Brief of CHARLES N. FOX, for the Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1881.

LORING P. HAWES, APPELLANT, *vs.* THE CONTRA COSTA WATER COMPANY, ANTHONY CHABOT, HENRY PIERCE, ANDREW J. POPE, CHARLES HOLBROOK, JOHN W. COLEMAN, AND THE CITY OF OAKLAND, APPELLEES.	No. 148.

Appeal from the Circuit Court for the District of California.

BRIEF OF MR. FOX, FOR THE APPELLANT.

HISTORY AND STATEMENT OF THE CASE.

On the 14th day of April, 1853, the Legislature of California passed a general incorporation law, entitled "*An act to provide for the formation of corporations for certain purposes*," the first section of which, as amended in 1855, reads as follows:

"Corporations for manufacturing, mining, mechanical, mercantile, wharfing, and docking, or chemical purposes, or for the purpose of engaging in any other species of trade,

business, or commerce, foreign or domestic, may be formed according to the provisions of this act; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and none others."

The remaining sections, as originally passed, and as amended in some particulars by an amendatory act passed in 1855, provided fully for the method of incorporation, and of subsequently conducting corporate business, but none of their provisions will be subject of special consideration in this case.

In 1858 the Legislature of that State passed another act, the second section of which was amended in a particular not affecting this case, of which act, as amended, the following is a full copy:

"AN ACT for the incorporation of water companies.

[Approved April 22, 1858, 218.]

"SECTION 1. The provisions of an act entitled 'An act to provide for the formation of corporations for certain purposes,' passed April fourteenth, one thousand eight hundred and fifty-three, and the provisions of an act to amend an act entitled 'An act to provide for the formation of corporations for certain purposes,' passed April fourteenth, one thousand eight hundred and fifty-three, and passed on the thirtieth (30th) day of April, one thousand eight hundred and fifty-five, shall extend to and apply to all corporations already formed, or hereafter to be formed, under said acts, for the purpose of supplying any city and county, or any cities or towns in this State, or the inhabitants thereof, with pure, fresh water.

"SEC. 2. Any company incorporated for the purposes specified in the preceding section shall have the right to purchase or appropriate and take possession of and use and hold all such lands and waters as may be required for the purposes of the company upon making compensation therefor. The mode of proceeding to appropriate and take possession of such lands and waters, when the parties cannot agree upon a purchase thereof, shall be the same as prescribed in sections twenty-seven, twenty-eight, and twenty-nine of an act to provide for the incorporating of railroad

companies, passed April twenty-second, eighteen hundred and fifty-three, except that such proceedings shall be had before the county judge of the county in which such lands or waters, or both, may be situated. But when the county judge shall be a party interested, then the same proceedings shall be had before the district judge of the district where the lands or waters are situated; provided, that all canals, reservoirs, ditches, pipes, aqueducts, and all conduits, heretofore built, or that hereafter may be constructed, by any corporation formed under this act, or claiming the privileges, rights, or immunities herein granted, or any of them, shall be used exclusively for the purpose of supplying any city or county, or any cities, or towns in this State, or the inhabitants thereof, with pure, fresh water. (Am., 1861, p. 228.)

"SEC. 3. All privileges, immunities, and franchises that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated, for the purposes aforesaid.

"SEC. 4. All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water to the extent of their means to such city and county or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: two by such city and county or city or town authorities and two by the water company; and in case the four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The board of supervisors or the proper city or town author-

ities may prescribe such other proper rules relating to the delivery of water not inconsistent with this act and the laws and Constitution of this State.

"SEC. 5. Any corporation created under the provisions of this act shall have the right, subject to the reasonable direction of the board of supervisors or city or town authorities, as to the mode and manner of exercising such rights, to use so much of the streets, ways, and alleys in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof.

"SEC. 6. Any corporation heretofore formed for the purpose specified in this act shall have the right to reincorporate under the provisions of this act, without losing, forfeiting, or diminishing any of the rights, privileges, franchises, or immunities which they have heretofore lawfully acquired."

Under these laws the defendant, the Contra Costa Water Company, was incorporated on the 13th day of June, A. D. 1866, for the purpose of supplying the cities and towns in the county of Alameda and the inhabitants thereof with pure, fresh water. (Record, f. 5.)

The defendant, the city of Oakland, was organized as a municipal corporation by act of the Legislature approved March 25, 1854, and has ever since existed as such, and is in the said county of Alameda. (Record, f. 6.) In fact, it is the principal city of Alameda county and the second city of the State.

On the 18th of July, 1866, the municipal authorities of the city of Oakland passed an ordinance granting to the Contra Costa Water Company the right to lay pipes in the streets, lanes, and alleys of the city. This ordinance is set out in the record at folios 15 and 16, but I am unable to see that its provisions affect the rights of either the city or the water company, as already provided by the laws of the State, in any matter that is the subject of consideration in this case.

Prior to July, 1877, the Contra Costa Water Company had constructed its works and introduced water into the city of Oakland, and prior to the 26th of July, 1877, a board of commissioners was duly appointed (in the manner provided in section 4 of the act of 1858) to determine the rates to be charged for water supplied therefrom; and on the said 26th day of July, 1877, said board did fix and determine a schedule of rates to be charged and collected by said company, for water supplied not only to the inhabitants, but also for municipal purposes other than "in cases of fire," which rates continued to be and remain in force up to and at the time of the commencement of this action. (Record, f. 8.)

Notwithstanding the rates so fixed for water supplied for municipal purposes other than "in cases of fire," the defendant, the city of Oakland, claimed the right to have and receive from the works of the water company, water for watering its streets, squares and parks, flushing its sewers, and for all other municipal purposes except those defined as "family uses," (drinking, lavation, &c., in its public buildings,) "free of charge," and took the same at its pleasure, from fire and water-cart hydrants, without rendering compensation therefor. (Record, f. 7.)

The complainant, appellant, is a citizen of New York, (f. 4,) and a stockholder of the defendant water company, (f. 9.) The personal defendants named in the complainant's bill are the president and directors of said corporation, (f. 5.) Prior to the commencement of this action, complainant applied to the board of directors to have them limit the supply of water taken by the city of Oakland free of charge, to cases of fire or other great necessity, and take proceedings to prevent the city from taking water for purposes other than in cases of fire or other great necessity, from the works of the company, without rendering compensation therefor; but the board wholly declined to take any proceedings in the premises, (f. 9.) Thereupon,

on the 15th day of July, 1878, the complainant filed his bill in the Circuit Court for the District of California, on behalf of himself and such other stockholders as should choose to come in and share the expense, praying for a decree that the water company is not bound to furnish water to the city of Oakland for any municipal purpose whatever, except in case of fire or other great necessity, free of charge, and that the city is not entitled to receive from the Contra Costa Company any water for the purpose of watering its streets, public squares, or parks, or for flushing its sewers, or for any like municipal purpose, without paying a compensation therefor according to the rates fixed by said board of commissioners, and that such purposes do not constitute a case of fire or other great necessity, and for injunction to enforce such decree, (f. 9, 10.)

The water supplied by the defendant company is catchment water, caught upon and stored in reservoirs erected upon lands owned by the company, situate several miles from the city, and carried by gravitation into and distributed through the city by a system of iron pipes; all the property and works being owned by, and procured, erected, and maintained at the cost of the company, without expense to the city, and without having ever been in any manner subsidized or aided by the city or the public.

The defendant water company and its directors made default. The city of Oakland appeared by counsel and demurred to the bill, (f. 17 and 18.) The case was heard upon such demurrer, which was sustained, and the bill of complaint was dismissed, (f. 22.) Thereupon this appeal was allowed and taken.

Assignments of Error.

1. It was error to hold that in the case of *The Spring Valley Water-Works* v. *The City and County of San Francisco*, referred to by the court below, there had been an authoritative or settled decision of the Supreme Court of California construing the meaning of the words "other great necessity," as found in the statute under consideration.

2. It was error to hold that the opinion expressed by the Supreme Court of California in the case of *The Spring Valley Water-Works* v. *The City and County of San Francisco*, referred to by the court below, was binding upon the national courts, or upon the parties hereto.

3. It was error to refuse to consider this case upon its merits as disclosed in the bill of complaint.

4. It was error to sustain the demurrer to the bill of complaint.

5. It was error to refuse to overrule the demurrer to the bill.

6. It was error to dismiss the bill.

7. It was error to enter judgment in favor of the defendants.

8. It was error to refuse to enter judgment in favor of complainant, as prayed for in his bill of complaint.

ARGUMENT.

The demurrer was upon two grounds, (f. 17 and 18,) only one of which was considered or passed upon by the court, or seems to have been relied upon or discussed by counsel, and that one was not considered upon the merits of the question involved; but the sole question discussed or passed upon was whether the Supreme Court of California had already given a decision upon the construction of the statute of California (the act for the incorporation of water companies, approved April 22, 1858) adverse to the position taken by complainant, binding upon him and upon the national courts. (See opinion of Mr. Justice Sawyer, f. 27 *et seq.*) The court held that it had so done, and in this we submit that it erred.

I.

There has been no such authoritative or settled decision of the Supreme Court of California construing the act of 1858 *in the particular involved in this case, adverse to the position of appellant, as is binding upon any of the parties to this suit, or upon the Federal courts.*

The real question involved in this case is the meaning of that part of section 4 of the act of 1858, hereinbefore quoted, which provides that companies organized under said act "shall furnish water to the extent of their means to such city and county, or city or town, *in case of fire or other great necessity*, free of charge;" whether this entitles the city to water free of charge, from works owned and held as those of the Contra Costa Water Company are, for the sprinkling of its streets, the watering of its parks and squares, the flushing of its sewers, and the like?

The question has been twice before the Supreme Court of California, in proceedings to which none of the persons

or corporations appearing or sued here were parties. On the first of these occasions a decision and final judgment was rendered which we claim was in full accord with the position taken by this appellant, and which necessarily involved a construction of this particular provision of the statute. The next was a later decision, rendered shortly before the commencement of this action, in which a minority of the judges expressed opinions adverse to the position of appellant, but in which the unanimous judgment of the court was given upon an entirely different ground, not involving the question at all. It was upon the faith of these latter opinions that the court below sustained the demurrer herein.

The first of these cases was that of *The City and County of San Francisco* v. *The Spring Valley Water Works*—a case that went twice to the Supreme Court before there was a final decision. The first decision in the case is reported in 39 Cal., 473. As appears from the record, and from the facts as recited in the opinion of the court, the case arose in this way: The plaintiff (city) claimed the right to tap any of the pipes of defendant, and take as much water as it might require, not only for the purpose of extinguishing fires, but for any and all other municipal uses, free of charge. The defendant denied this, except as to water used for the extinguishment of fires, and threatened to cut the city off from water for all other purposes, unless she rendered compensation therefor. Thereupon the city brought its action to enjoin the defendant from cutting her off from water used for municipal purposes other than the extinguishment of fires. Although not stated in the opinion, the fact was that the municipal uses which were the immediate bone of contention at that time were the sprinkling of streets, the irrigation of parks, flushing of sewers, and for the use of its prisons, almshouses, and the like; and this fact is clearly inferable from the record; and the complaint specially

averred that the water claimed was "*indispensable to the city.*"

The company defendant in that case was not only organized under this general law of 1858, but also at that time claimed under some special ordinances and acts which slightly differed from the general law, and omitted the words "or other great necessity." The opinion given at this time was favorable to the company, but was based upon these special acts and ordinances, and no final judgment was pronounced, as the case was sent back for further proceedings under a plea in abatement.

The case came up again on appeal from a judgment in favor of defendant, and at the July term, 1874, that judgment was finally affirmed by the Supreme Court. The direct question in the case was whether the city was entitled to water for her general municipal uses, other than the extinguishment of fires, (and which then included specially the irrigation of parks and flushing of sewers,) free of charge, and on that question the judgment was in favor of defendant, and the prayer for injunction against shutting off the water was denied. And this, too, after expressly deciding, in two elaborate opinions, that the rights, duties, and obligations of the water company were to be determined and ascertained entirely from the general act of 1858 herein quoted; that the special act was void; and that under the general act the company was bound to furnish water to the extent of its means, *in case of fire or other great necessity*, free of charge.

See San Francisco *v.* S. V. W. W., 48 Cal., 509.

This was a final judgment of the highest court of the State that the words "other great necessity," as and in the connection used in the statute, did not include the sprinkling of streets, the flushing of sewers, the irrigation of parks, or any other use of daily or ordinary occurrence. The judgment for defendant denying injunction and dis-

missing plaintiff's bill could not have been rendered without first having reached that conclusion. Defendant conceded in the case that if plaintiff was entitled to water free of charge for any of these purposes, it was entitled to the injunction, and yet the injunction was denied and the bill dismissed.

We now take the liberty of referring to an epoch in the political history of the country, of which the court may fairly take judicial notice, for the purpose of leading up to and showing how the next case arose.

Soon after the judgment in the case just considered was rendered, measures were taken looking to an adjustment of the price to be paid for water for municipal purposes other than the extinguishment of fires. Before these were finally completed a little cloud arose in the political horizon, at first no bigger than a man's hand, but which was fanned by a sensational press until it finally overwhelmed the State, threatening destruction to every corporate organization and to the aggregation of capital in every form, destroying confidence in the power of the government to protect property, driving capital out of the State, and reducing property values an average of at least fifty per cent. throughout its entire borders. Under the influence of this whirlpool of revolution, now happily abated, the negotiations for adjustment were delayed and finally broken off; and on the 1st of April, 1877, the defendant in that case commenced the work of shutting off the water from the public parks of the city, as the court had in effect adjudged that it had a right to do. On the following day the legislative department of the city government, in disregard of the judgment aforesaid, passed a resolution instructing the mayor to make connections with the pipes of the water company, and take therefrom whatever water was required for municipal purposes; and at the same meeting passed through its first stage of legislation an ordinance in form conferring upon the mayor full power to make such connections and take

thereby water from the works of the water company for all municipal purposes, and making it a crime, and punishing accordingly, to interfere with or obstruct the mayor in making such connections or taking water as aforesaid.

Two days afterwards the Spring Valley Water Works filed its petition in the Supreme Court for a writ of prohibition, against the city and county, and the mayor and board of supervisors thereof, to prevent the execution of said resolution and the final passage of said ordinance, and upon this arose the second case, upon the result of which Mr. Justice Sawyer has based his decision in this case. The report of the case will be found in 52 Cal. Rep., p. 111.

The plaintiff in that case set out and specially pleaded the proceedings and judgment in the former case; averred that the purposes for which the city was now attempting to take the water were the same, and none other, as the purposes for which she claimed the right to take it in the former case, and plead that the city was estopped by the judgment in the former case from claiming the water for these purposes free of charge. The defendant, by its answer, first raised a question as to the power of the court to interfere with the proceedings of defendant by writ of prohibition, and then proceeded to answer the petition upon its merits. In doing this it admitted all the facts which had been plead by way of estoppel, but denied the legal effect, and claimed that the judgment in the former case did not determine for what purposes the city was or was not entitled to water free of charge.

The case was argued upon both defenses, the plaintiff relying upon the original argument, upon its plea of estoppel, as to the second defense, and the defendant going into an elaborate discussion of the meaning of the words "other great necessity."

The court was composed of five judges, but the chief justice, Wallace, having been of counsel in the former

case, did not sit in the case. When the decision in the case was promulgated it was found that the remaining four had unanimously concurred in a judgment *dismissing the writ for want of jurisdiction.* That legally and legitimately ended the case. But the influence of the storm was evidently felt around the temple of Justice, for after reaching this unanimous conclusion, two of the justices proceed to an elaborate discussion of the effect of the former judgment, and of the meaning of the phrase "other great necessity." Justice McKinstry delivered what is treated as the leading opinion, and held that whatever might be the legal effect of the judgment in the former case, it was evidently not the intention of the court in that case to do more than to decide that the city was not entitled to water free of charge for *all* purposes. He then proceeds to a discussion, in which he ignores the fact that in the complaint in the former case the plaintiff alleged that the defendant was "incorporated under the 'Act for the Incorporation of Water Companies,' approved April 22, 1858," as well as under certain other acts and ordinances; and that "under and by virtue of the said several acts of the Legislature of the said State of California, and orders and ordinances of the board of supervisors aforesaid, * * * it has become and is the duty of the defendant to furnish * * * water for the extinguishment of any fire, and for all other municipal purposes, within the limits of said city and county of San Francisco, to the full capacity of the works held and controlled by the defendant, free of charge to the plaintiff;" and also ignores the fact that the complaint alleges that [my quotations are from the record] the uses to which plaintiff is applying the water are "indispensable to the plaintiff, to the good order, government, health, and general security of the city," and that to be deprived of it would subject it to "great damage and destruction by fire, and would injuriously affect the cleanliness of the city and county, and the health of the inhabitants thereof, and would

greatly injure and obstruct the almshouse, the hospitals, industrial school, and other public institutions of the said city and county of San Francisco," all of which clearly indicated the purposes for which the water was then used and claimed.

Upon these allegations, and *under this law*, as well as all others, the issue had been joined, and yet the learned justice in his opinion says that there was no allegation on the part of plaintiff that "there were any 'great necessities' for which the water should be furnished free, and in the absence of such allegation the judgment of the court only determined that the city and county were not entitled, as it claimed, to free water for all purposes." (52 Cal., 119.)

He also overlooked the fact that in the former case, in denying the prayer of the complaint and dismissing the bill, the court had expressly said that it tested the obligations of defendant *only by the general law*, and held the special act to be void, and now says in substance that the decision in the former case turns upon the construction of the special act. This was a most remarkable misconception of both the record and the judgment in the former case. But the conclusion reached is still more remarkable. It is this:

That the city is bound to pay for "water supplied for drinking and culinary purposes, for purposes of lavation, and for like domestic uses to the inhabitants or occupants of the various institutions, penal or charitable, established or under the control of the city and county government; to the public schools and to the public offices; and that it is the duty of the corporation [plaintiff] to furnish water free (to the extent of its means) for the extinguishment of fires, and to the fire department, and for all other purposes for which it may be demanded by the authorities of the city and county in discharge of their direct duties as governmental agents—being such uses as are distinguishable from family uses, as hereinbefore defined." (P. 122.)

In other words, holding that water supplied and used for sustaining human life was not a great necessity, and must therefore be paid for; but water supplied for taste or ornament, or for any other use for which the city might demand it, was for a great necessity, and must be furnished free of charge.

As this is announced as the opinion of the court, and no other judge concurred in it, it is fair to assume that Mr. Justice Niles, who otherwise seems to have been silent, concurred. But even then it is the opinion of a minority and less than a quorum of the court, and I have yet to learn of any member of the profession off the bench, or of any other on the bench, who approved the reasoning, or of only one other who approved the conclusion reached.

Mr. Justice Crockett concurs specially in the judgment of dismissal for want of jurisdiction, and also in the conclusion reached on the other proposition; but he reaches that conclusion by an entirely different course of reasoning, and puts it on another ground, viz., that payment must be made for the water designated by Justice McKinstry, because it was for "family uses," and the statute had provided that the company should be entitled to pay for water furnished for "family uses," at reasonable rates, to be fixed, &c., but that the city was not bound to pay for water used for any other purpose, for the reason that the company was not authorized by the terms of the act to collect pay for water furnished to any person or corporation for any purpose other than "family uses," (f. 123.).

If it were possible to reach an absurd conclusion by a more fallacious course of reasoning than that adopted in the leading opinion, the author of this concurring opinion attained that distinction.

The learned judge forgot that the very court in which he was sitting, as long ago as when it was presided over by one of the distinguished justices now upon this bench, decided that water companies incorporated under these

laws were formed for the purpose of engaging in a species of trade and commerce; that they were authorized by law to deal in water, and that "water, when collected in reservoirs and pipes, and thus separated from the original source of supply, is personal property, and as much the subject of sale—an article of commerce—as ordinary goods and merchandise."

Heynemann v. *Blake*, 19 Cal., 594.

And that the soundness of this decision has never been questioned.

It does not seem to have occurred to his honor that a person engaged in trade and commerce may, of natural right, sell his personal property to whomsoever he pleases, and at whatever price he can agree upon with the buyer, and that a private corporation, lawfully engaged in the same business, may lawfully do the same thing, except so far as by statute or contract it shall have been expressly restricted in its power of sale, or in the fixing of price; and yet such is undoubtedly the fact and the law. Except so far as expressly prohibited by the provisions of the statute under which these water companies are organized, the acceptance of which by the companies constitutes them a contract between the parties, there is no limit to the right of a company to sell its water within the district in which it is authorized to act, and to fix the price thereof, in the same manner as other persons may sell and fix the price of wine or any other commodity in which they may deal.

In the absence of the contract found in the act of 1858 and the acceptance of the provisions thereof, the State has no power to take any part of this property for public use without due process of law and rendering just compensation therefor; (see amendments V and XIV to Constitution of U. S.;) or any power to interfere in fixing the price at which the same shall be sold.

By that contract, however, the company agreed, 1st,

that it would furnish water so long as the supply should permit to the inhabitants for family uses, at reasonable rates, to be fixed by arbitration; 2d, that it would furnish water to the extent of its means, for certain specified purposes, free of charge. And these are the only limits which are placed upon the power of disposition which the company has over its own property, by reason of any law, or any contract. It follows as a natural sequence that it may dispose of all its surplus water as it pleases, and upon its own terms. And yet we are told that the city need not pay for any water which does not come within the term "family uses," because the company is not in express terms authorized to charge for it for any other purpose. As well may it be said that the city need not pay for the bread upon which it feeds its wards, because there is no statute which says in express terms that the baker may charge a price therefor.

It is under the statute of 1853 that these corporations find their right to organize, to exist, and to do business. Under that statute they must organize, if at all; and under it they could exist and engage in this same business if the act of 1858 had never been passed. Under that act of 1853 all other trading corporations in the State organized prior to the adoption of the codes in 1872 exist and carry on their business, and there is not a line in it which limits their power of disposition of the personal property in which they deal, or of fixing the price thereof, or in express terms confers upon them the right to charge or collect a price therefor. And yet no one ever thought of questioning the right to sell for a price, or of asserting the right to take their property without price by reason thereof.

Nothing can be found in the act of 1858 to change this rule as to water companies except to the limited extent above stated, and outside of that limitation these companies stand upon the same footing as all others.

Mr. Justice Rhodes specially concurred in the judgment

of dismissal for want of jurisdiction, but declared that he was not prepared to express an opinion upon the other subject discussed by his colleagues, "because a determination that the writ would not lie is a final disposition of the action, and conclusions upon the other question would be mere *dicta;* and because he was not satisfied that the construction of these words was not conclusively settled by the judgment in the former case," (f. 126.)

Here, then, we have a final judgment of dismissal for want of jurisdiction, concurred in by the full bench qualified to sit in the case, followed by the opinions of a minority of the court, reaching a certain unnecessary conclusion by contradictory and conflicting courses of reasoning and of law; which opinions are mere *dicta* upon their face, and are so declared by another of the judges; and these opinions are held by the court below in this case to be binding upon the Federal courts, and consequently conclusive of this action.

This was error. Those opinions were not binding upon the Federal courts, *or upon anybody.*

It is true, as Justice Sawyer says, that the question passed upon in these opinions was elaborately argued upon petition for rehearing, by counsel for plaintiff, and by a stockholder who then appeared as *amicus curiæ*, but they were none the less *dicta* for that reason. It was confessedly not because they were the basis of any judgment, but manifestly because they were opinions which, though merely *dicta*, struck a vital blow at the value of the stock of the corporation. They were characterized as *obiter* by counsel, and in denying the petition the court did not claim that they were otherwise.

The uniform rule of this court, as I understand it, is that where there has been an authoritative and settled construction given to a State statute by the highest tribunal of the State, and there is no provision of the Constitution

or laws of the United States involved, the Federal courts will be bound by the construction so given by the State court. The converse of the proposition is that where there has been no such authoritative and settled construction given by the State court, and the rights of the citizen of another State are involved, the Federal courts will construe the statute according to their own judgment and sense of right. This must be so, else the law which was framed for the protection of the citizen of another State, and gives the Federal courts jurisdiction in such cases, is a mockery and a sham. It makes this great tribunal a mere recorder of the opinions of the State courts, and compels it to wait till it can get the opinion of the State court before it can pronounce judgment on the rights of a citizen of another State.

The opinions which we have here under consideration, and which Mr. Justice Sawyer treats as binding upon him, although he does not intimate that they meet his approval, are neither an authoritative nor a settled construction of the State statute.

They are not authoritative, because they do not constitute the basis of any judgment, and are mere *dicta* upon a subject not involved in the decision of the case, and not necessarily the subject of consideration or discussion therein.

They are not a settled construction of the statute, because they are at best the opinions of a minority, or at most a part only, of the judges of the court—conflicting as between themselves, and both in conflict with the only judgment which the court ever pronounced, necessarily based upon a construction of the statute.

The only decision which has ever been given by the State court which is entitled to be regarded as a construction of this statutory provision was that found in 48 Cal., p. 493, and the legal effect of that is, as applied to this case, that the city of Oakland is not entitled to water free

of charge from the water-works in which this complainant is a stockholder, for any of the purposes for which he seeks to have her restrained from taking it. In other words, the legal effect is that he is entitled to all the relief prayed for in his bill.

II.

The provision of the statute under consideration, if construed in accordance with the opinions accepted by the court below, and the decision based thereon, is in conflict with that provision of the Constitution of the United States which declares that private property shall not be taken for public use without just compensation, and with that other provision which declares that no State shall pass any law which shall deprive any citizen of life, liberty, or property, without due process of law.

I know that the answer to this proposition has been that the property is so taken only in pursuance of our contract, and consequently it is lawfully taken. But, with all due deference, I reply, that is the answer of a demagogue, unwittingly adopted by better men. It is an answer which will not bear analysis. It involves a confession that the right to take is not one *reserved by the State* out of something granted by her, but one *granted to the State* by the private corporation.

It is, therefore, not one to be construed liberally in favor of the State, but at least fairly in favor of the citizen.

It is a grant derogatory of the rights of property, one that takes away the estate of the citizen, and ought to be construed strictly. (Sharpe *v.* Spier, 4 Hill, 76.)

It is one which should be construed most strongly against the Government, and in favor of the subject or citizen. Its provisions ought not to be extended by implication beyond the clear import of the language used. (United States *v.* Wiggleston, 2 Story, 369.)

It is one which, by its express terms, grants to the State the right to take our property for a specified purpose without compensation, and we are asked to construe it into a right to take it without compensation for any and every public use for which the public officers may demand it, except the preservation of human life. This construction cannot be given to it without violence to the language used, and a destruction of the rights guaranteed to the citizen by the constitution of our Government.

It is the duty of the court, if possible, to so construe the statute as to give force and effect to every part of it, and so as not to bring it in conflict with the Constitution. The moment it is given such a construction as to bring it in conflict with the Constitution, that moment all force and effect is taken from it, and it is rendered a nullity.

The court in 48 Cal. did so construe the act as to preserve it, and give force and effect to its every part, without extending it beyond the terms used. And that is the only authoritative construction which it ever has given to the act.

III.

The Supreme Court, in 48 Cal., is strictly accurate in its construction of the statute, when it says at pages 514–15:

"TESTED BY THE GENERAL LAW *under which the defendant was organized, it is under no obligation to furnish water to the city and county free of charge, except for the extinguishment of fires during the pendency thereof.*"

The statute requires the company to furnish water free of charge in case of fire. In legal effect it goes no further and has no other meaning.

The words "or other great necessity" are vague, indefinite, uncertain, meaningless, and therefore void. They are like the words "for other purposes" frequently found in the titles of acts, and these have been held to express

nothing, and amount to nothing; that they must be laid out of consideration; that nothing which the act could not embrace without them could be brought in by their aid.

Town of Fishkill *v.* Fishkill and Beekman Pl. Road Co., 22 Barb., 642.

Rynerson *v.* Utley, 16 Mich., 296.

St. Louis *v.* Tiefel, 42 Mo., 578.

IV.

Under the decision in 48 California, the question was *res judicata*, and the court had no power in 52 California, between the same parties, and upon the same subject-matter, to reconsider the question. (Van Renssalaer *v.* Kearney, 11 How., 326.)

"A decision once made in a particular controversy by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies, and they are not allowed afterwards to revive the controversy in a new proceeding, for the purpose of raising the same, *or any other questions*. The matter in dispute has become *res judicata*, a thing definitely settled by judicial decision, and the judgment of the court imports absolute verity. Whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment—the rule of finality is the same. The controversy has been adjudged, and, once finally passed upon, is *never to be renewed*."

"The rule of conclusiveness to this extent IS ONE OF THE MOST INFLEXIBLE PRINCIPLES OF THE LAW; insomuch that even if it were subsequently held by the courts that the decision in the particular case was erroneous, such holding would not authorize the reopening of the old controversy, in order that the final conclusion might be applied thereto." (Cooley on Constitutional Limitations, p. 47, citing a large number of adjudicated cases from this and other courts.)

After judgment on the merits the parties "*cannot canvass the same question again in another action*, ALTHOUGH, PERHAPS, SOME OBJECTION OR ARGUMENT MIGHT HAVE BEEN URGED UPON THE FIRST TRIAL *which would have led to a different judgment.*" (Greathouse *v.* Bromley, 7 T. R., 456.)

If this court shall be of opinion that the decision in 48 California does not furnish a construction of the statute binding upon the Federal courts, or is not sufficiently clear and definite as to the meaning of the words employed, and that the words do have a meaning beyond that suggested in point III, then I submit—

V.

The words are to be construed "*according to the context* and the approved usage of the language." (Civil Code of Cal., sec. 13; Code of Civil Procedure of Cal., sec. 16.)

That they must be construed according to common acceptation, having reference to the context.

That in their construction no word shall be supplied or changed, unless to effect a meaning clearly shown by other parts of the act—to carry out an intent somewhere expressed. (Lane *v.* Schamp, 20 N. J. Eq., 82.)

That they cannot be qualified by construction. (*Hyatt* v. *Taylor*, 42 N. Y., 250.)

That since the effect is to deprive the citizen of property without compensation, the statute should be construed strictly, and the obligations imposed by it should not be enlarged by implication or construction.

VI.

So construed, the city is not entitled to water free of charge for sprinkling her streets, watering her parks, flush-

ing her sewers, or for any other purpose of ordinary regular occurrence, for and against which she could regularly provide; but only "in case of fire," or in case of some other and like calamity, arising out of a sudden emergency, which could not have been anticipated, and involving a necessity for the use of an unknown quantity, for which provision could not have been made. This is the extent of our contract and the limit of our obligation.

"Case," *casus, cadere;* to fall; to happen; that which falls, comes, or happens.*

If the words "or other great necessity" mean anything, they are to be read as if the word "case" was repeated: "In case of fire, or in case of other great necessity." It means, then, "upon the happening of fire, or upon the happening of other great necessity." Or, to make it still plainer, "upon the happening of fire, or upon the happening of other event producing a great necessity." Not, as the court would read it in 52 Cal., "upon the happening of fire, and for all other purposes for which it may be demanded by the authorities of the city and county in the discharge of their direct duties as governmental agents."

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* Etymologically considered, the primitive meaning of the word case involves the idea of chance. Both words are derived from and reflect the meaning of the Latin *casus*, from *cadere*, to fall; *that which falls out or happens.* Richardson, whose dictionary is arranged on an etymological basis, groups the words *case, casual, casually*, and *casualty* as from a common origin and having a radical primitive meaning in common. In Facciolatus and Forcellinus' great Latin lexicon (Bayley's edition), we have under the word *casus:*

"Item Sæpissime de quacumque ruina, qua quis de suo stato aliquo modo decidit: *misfortune, adversity, mishap, calamity, distress.*"

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"Præteria Sumitur, pro eventu fortuito, et non prœviso, sive bonus, sive malus sit: *accident, hap, fortune, chance.*"

I am not aware that any English lexicographer furnishes a definition of the precise phrase "*in case of.*" but the peculiar form of condition implied by the words *in case* has attracted the attention of both Worcester and Webster. The former (*cerbo* case) gives "in case: *if it should happen; provided that;*" and the latter, under the same word, says: "*In case* is a phrase denoting condition or supposition; literally, *in the event or contingency; if it should so fall out or happen.*"

The authorities of the city and county may demand it for a thousand purposes, not one of which *befalls* or *happens*, but all of which are of daily and constant recurrence, or, in other words, of perpetual existence. When we examine this word, there can be no doubt that the only time when a company is required to furnish water free of charge, is upon the happening of some event producing an urgent necessity, for which provision could not be made in advance —something out of the ordinary course; something which, if it could be anticipated as likely to happen at some time, was still uncertain as to time and as to the extent of the demand.

The maxim of *noscitur a sociis* cannot be ignored in the construction of this sentence. An illustration is given of the kind of *case*, calamity happening, which will justify the public in demanding this property free of charge; and it is clear that it is only in similar cases, upon the happening of a similar calamity, that it can be required of us to furnish the water free of charge. This view is borne out by the construction given to similar language in Mills *v.* Baehr's Executors, 24 Wend., 254, and by the principles established in Biggelow *v.* Collamere, 5 Cush., 226, and Wells *v.* Castles, 5 Gray, 325.

The words of the statute are, "and shall furnish water to the extent of their means to such city and county, or city or town, *in case of* fire or other great necessity, free of charge."

The meaning of this sentence does not depend on the force of the word necessity, or great necessity, so much as it does on the words "*in case of.*" This is a peculiarly idiomatic English expression. It has a well-defined meaning, and one which *never varies.* It imports the happening of some occurrence which, though quite liable to happen, is *out of the usual and ordinary course.* Thus we say, "in case of death," "in case of fire," "in case of famine," "in case of storm," "in case of shipwreck," "in case of

earthquake," "in case of accident," "in case of loss" (in a policy), "in case of disapointment," "in case of miscarriage," "in case of misfortune," "in case of a fall from your horse," "in case of disagreement of the jury," "in case of vacancy in the office," "in case of overflow of the pipes." We do not say in case of sunrise, in case of daybreak, in case of breakfast, in case of dinner, in case of night-fall, or the like, for these are usual daily occurrences. We say "in case of war," "in case of insurrection," "in case of rebellion," and "in case of riot," for these are out of the ordinary course and normal condition of society. But we do not say in case of peace, for the contrary reason. Speaking of an individual, to say "in case of intoxication," implies that, though ordinarily sober, he is liable to be intoxicated; and *vice versa*, to say, "in case of sobriety," would intimate that he was ordinarily intoxicated, though sometimes sober. In speaking of a lunatic we say, "in case of a lucid interval," intimating his ordinary condition to be otherwise. Whereas of a man usually in his right mind, but subject to occasional aberrations, we would say, "in case of his insanity."

Hittel's Digest of the Laws of California gives the following instances of the use of the expression in our constitution and statutes:

Const., sec. 162: "In case of disagreement between the two houses." Id., sec. 168: "In case of the impeachment." Id., sec. 195: "Except in case of war." Sec. 361: "In case of the indenture being declared void." Sec. 630: "In case of the death, &c." Sec. 631: "In case of such vacancy." Sec. 871: "In case of refusal." Sec. 946: "In case of any violation." Sec. 945: "And in case of any excess." Sec. 970: "In case of fire." Sec. 2416: "Sixth, in case of the conviction." Sec. 3574: "In case of the destruction." Sec. 4329: "In case of a vacancy." Sec. 4821: "In case of an assignment." Sec. 4955: "In case of the death or other disability." Sec.

5154: "In case of the death, &c.," "and in case of the decease."

There are, probably, other examples of the phrase, but these are sufficient. It will be seen that they invariably indicate the happening of some event out of the usual routine of occurrences, and *the happening of that event* gives rise to some right which would not otherwise exist, or the application of some rule not otherwise applicable. The nearest equivalent of the expression is "*on the happening of*."

Reading the statute, then, by these, the only safe or just rules of construction, the demurrer in this case should have been overruled, and the court should have held that the complainant was entitled to the relief demanded, and in the absence of other defense should have given judgment accordingly.

VII.

The second ground of demurrer, (f. 18,) was not discussed by counsel or considered by the court. It was not well taken, for it confesses, in effect, that if the complainant had requested the company and its directors to bring suit, and they had refused, then the present complainant can maintain this action. And such is the law. The bill distinctly avers both the request and the refusal, (f. 9.)

CHARLES N. FOX,
Of Counsel for Appellant.

IN THE

Supreme Court of the United States.

LORING P. HAWES,

Complainant and Appellant,

vs.

THE CONTRA COSTA WATER COMPANY

(a Corporation), et als.,

Defendants and Appellees.

Brief for Appellee,

THE CITY OF OAKLAND.

HENRY VROOMAN,

Counsel for Appellee, the City of Oakland.

Filed this ..... *day of* .....

A. D. 188....

..... *Clerk.*

By ..... *Deputy Clerk.*

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1881.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

LORING P. HAWES,
Complainant and Appellant,

vs.

CONTRA COSTA WATER COMPANY, ET ALS.,
Defendants and Appellees.

BRIEF FOR APPELLEE,

THE CITY OF OAKLAND.

Statement of the Case.

This is a suit in equity, instituted by the complainant as a stockholder of the Contra Costa Water Company, one of the defendants herein, for himself "and in behalf of all other stock-"holders of the Contra Costa Water Company

" who may choose to come in and contribute to the " cost and expense of this action."

The defendant, the Contra Costa Water Company, is a corporation duly organized under the Acts of the Legislature of the State of California, entitled respectively "An Act to provide for the formation of corporations for certain purposes," approved April fourteenth, A. D. eighteen hundred and fifty three; and " An Act for the incorporation of water companies," approved April twenty-second. A. D. eighteen hundred and fifty-eight, and the Acts supplementary thereto and amendatory thereof.

Said corporation was formed for the purpose of supplying the cities and towns in the County of Alameda, and the inhabitants thereof, with pure fresh water.

The City of Oakland is a municipal corporation, organized and existing under and by virtue of an Act of the Legislature of the State of California, entitled "An Act to incorporate the City of Oakland," approved March twenty-fifth, A. D. eighteen hundred and fifty-four, and the Acts supplementary thereto and amendatory thereof, and said city is situated in the County of Alameda, in said State. Complainant seeks to enjoin and restrain the defendant, The Contra Costa Water Company and its Board of Directors and Trustees, from furnishing, and the City of Oakland from taking, water free of charge for watering the streets of said city, or its public squares or parks or for flushing its sewers, or other like municipal

purposes. The City of Oakland demurred to the bill; the other defendants defaulted.

The City of Oakland by its demurrer made two objections to complainant's bill as follows:

1st. That the said complainant had not in and by his said bill, made or stated such a case as doth, or ought to entitle him, in a Court of Equity, to any such relief as is sought thereby and prayed for, or to any relief as against this defendant as to the matters contained in said bill, or any such matters.

2d. That the said complainant had not legal capacity to bring this suit.

On the hearing in the Court below, both points were discussed by the solicitors for the respective parties, and the judgment of the Court proceeded upon the first objection made in the demurrer.

We think that both objections made by the demurrer are fatal to complainant's right to maintain this suit; and we shall therefore proceed to discuss the second objection, before entering upon the consideration of the question upon which the Court below rendered its judgment.

We make the following

POINTS:

I.

The complainant has not legal capacity to bring this suit.

It appears by the bill of complaint herein, that if any cause of action exists by reason of the mat-

ters therein stated. such cause of action is in favor of the defendant, the Contra Costa Water Company only.

Transcript, pp. 9 and 10.

II.

A stockholder of a corporation is not entitled to institute and maintain a suit in equity, in his own name, against the directors of a corporation and the corporation itself, concerning the management of the affairs of the corporation, unless the directors have been guilty of fraud.

In other words, the directors or trustees of a corporation cannot be called to account by a stockholder for an error of judgment in the management of the corporate business, *unless their acts are tainted with fraud.* And even in case of fraud a stockholder is not entitled to commence and maintain a suit in equity in his own name against a wrongdoer, whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their stock, unless he shall have first made application to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the Board of Directors is essential in order to give to the stockholder any standing in Court, as the charter confers upon the directors the general management of the business of the company. There must be a clear default therefore on their part, involving a breach of duty, within the rule established in

equity, to authorize a stockholder to institute the suit in his own behalf, or for himself, and other stockholders who may choose to join.

Dodge vs. Woolsey, 18 How., 343–4.

III.

There is no averment in the bill filed herein that the complainant made a demand before the commencement of this suit, upon the directors or trustees of the said Water Company that they should commence this or any suit, or for the use of the corporate name, or that the directors or trustees of the said company refused to institute this suit, or that they are fraudulently, collusively or unlawfully allowing the said city to take and use the water of said Water Company without compensation.

The only averment in the bill upon this point is as follows, to-wit:

" On the tenth day of July, A. D. 1878, he " (complainant) " applied to the President and " Board of Directors or Trustees of said water " company, and requested them to desist from " their illegal and improper practices aforesaid, " and to limit the supply of water, free of charge, " to said city, to cases of fire or other great necessity, and that said Board should take immediate " proceedings to prevent said city from taking " water from the works of said company for any " other purpose without compensation, but said " Board of Directors and Trustees have wholly " declined to take any proceeding whatever in the

" premises, and threaten to go on and furnish
" water to the extent of said company's means to
" said City of Oakland, free of charge, for all
" municipal purposes, as has heretofore been done,
" and to cases other than in case of fire or other
" great necessity, except as for the family uses
" hereinabove referred to; and your orator avers,
" that by reason of the premises, said water com-
" pany and your orator, and the other stockhold-
" ers thereof have suffered, and will, by a contin-
" uance of said acts, hereafter suffer great loss
" and damage."

Transcript, p 11.

Now we submit—

(*a*) That the demand referred to was not such a demand as is required by the rule laid down in the case hereinbefore cited; and,

(*b*) That the request made by the complainant upon the Board of Directors, " to desist from their " illegal and improper practices aforesaid" was not sufficiently definite to notify them as to what he desired to have done.

How could the directors or trustees determine from this vague and indefinite notice what proceedings should be taken in the premises in order to satisfy complainant? They were, at the time of the service upon them, of the aforementioned notice, furnishing and supplying water to the City of Oakland in strict accordance with the provisions of the Charter of the Company which they represented, as that Charter had been construed by the Supreme Court of their State, and

therefore the directors were entitled to have pointed out to them specifically, and in no uncertain words, exactly what it was that complainant desired them to do. How could the Board of Directors be expected to know that complainant desired them to place another and different construction upon the words " other great necessity" used in their Charter, than that placed upon those very words by the Supreme Court of their own State?

While it may be true that every stockholder has rights which both law and equity will protect, still he is represented in his rights by a Board of Directors authorized by law, and in the election of whom he and his stock took part. Now the defendant, the Contra Costa Water Company, is a corporation having a separate existence as an artificial person, acting by and through such a Board of Directors. The very purpose of incorporation is to create such legal and artificial person in law, distinct from the multitude of persons holding its stock, in order to avoid the extreme difficulty and utter impracticability of such a multitude of persons acting together in their individual capacities. Hence we have the rule of law universally adopted in this country, "That " the corporate powers, business and property of " all corporations must be exercised, conducted " and controlled by a Board of Directors, to be " elected from among the holders of stock." Such a provision is contained in the Act under which the Contra Costa Water Company is incorporated. Under the law these directors are

the representatives of the stockholders, and the stockholders, by electing the directors, delegate to them the power of managing the general affairs of the corporation. This is what the directors and their election is for. It is true that the stockholders may still have reserved rights; but these reserved rights are secondary, and can be exercised by the stockholders only in exceptional cases. [We shall discuss these exceptional cases hereafter.] But the logic of the thing, and the general rule is, that the management of the corporate affairs is vested in its Board of Directors, acting under the corporate name, for which management they are clothed with full power. If, ignoring the function of the Board of Directors, one of the stockholders may, without the directors' consent, and without demand upon them, bring a suit in his individual discretion, so may another stockholder and another; this would lead to

1st. To a multiplicity of suits;

2d. To a conflict of authority in managing the corporate business; and

3d. To the subrogation of the authority of the Directors (who represent all the stockholders) to the mere option of a single stockholder.

Whereas, the very idea of a Board of Directors for a corporation is to prevent all these things.

The authorities are uniform upon this point.

Smith vs. Hurd, 12 Mat., 383.

Gardiner vs. Pollard, 10 Bosw., 675.
Greaves vs. Gagul, 16 Abb. Pr. N. S., 379.
Hersey vs. Veazil, 24 Me., 9.
Memphis City vs. Dean, 8 Wall, 73.

Now, as to the isolated or exceptional cases in which a stockholder may maintain the suit:

1st. Clearly, if a stockholder considers himself injured, or about to be injured by the fraudulent management of the directors, and if thereupon he make application to the directors for the use of the corporate name whereunder to enforce his rights, and they refuse him, then he is entitled to proceed in his own name. But, as we have before stated, no such demand or refusal is averred in complainant's bill, and therefore he is not clothed with the legal capacity of one under and entitled to the benefit of this exceptional case of a stockholder.

2d. It may be said that where the directors of the corporation are themselves the parties complained of, there is no need of making a demand upon them for the use of the corporate name. But even conceding that such a case might exist, it could only exist in one or two cases, to wit:

(*a*) Where the directors themselves are charged with fraud or collusion.

(*b*) Where the directors are charged with acts *ultra vires*.

Now, there is no averment in complainant's bill of any fraud, or collusion, or of anything that even points in that direction. Nor is there any

averment that the acts of the Board of Directors were *ultra vires*. In the case of Dodge vs. Woolsey, 18 How., 339, the directors were about to pay a tax, which complainant there averred was unconstitutional, both under the Constitution of the State of Ohio and under the Constitution of the United States; and, therefore, an act *ultra vires*, if payment was made, and in this case the Supreme Court of the United States held that demand and refusal were necessary averments. That was a much stronger case for the complainant there than is this case for the present complainant, in this: That in that case double unconstitutionality was averred, and therefore an act two-fold *ultra vires;* whereas, in the case at bar, no questions of constitutionality, under either State or Federal Constitution is raised; and therefore, no act *ultra vires* is pleaded by any averment in the bill. And even if in this case complainant desires to raise the question of *ultra vires* against the Board of Directors, he never can raise it, except by pleading it. So, the complainant is not within any of the possible exceptional cases wherein he could claim that he is excused from showing the demand for and refusal of the corporate name. Therefore, under both the general rules and under all the possible exceptional cases, this complainant is forestalled from prosecuting this suit upon the pleadings as they now stand.

IV.

Upon the Merits.

"The construction by the highest Court of a State "of a statute of the State which does not trench "upon any of the powers of the National Govern- "ment or upon any rights guaranteed or protected "by the Constitution of the United States is au- "thoritative and conclusive in the National "Courts."

The Federal Court, sitting in a State, can afford no greater relief than the parties could obtain were they to resort to the Courts of a State. In other words, in all cases in which the Federal Courts have jurisdiction arising out of the citizenship of the parties, the Federal Courts are bound by the statutes of the several States as interpreted by the Supreme Courts of the several States, so far as the question of relief to be administered is concerned, when no Federal question is involved. In the case of Irving vs. The City of St. Lewis, (5 Wall, 413), the Court say: "The complainant can ask no greater relief in "the Courts of the United States than he could "obtain were he to resort to the State Courts. "If in the latter Courts equity will afford no re- "lief, neither will it in the former."

In the case of Dodge vs. Woolsey, (6 McLean, 150), the Court say: "This Court brings into a "State no novel principles. It administers the "law of the State. In giving effect to the "statutes of the State where there is no conflict

"with the Federal Constitution, the Courts of the "Union follow implicitly the rule established by "the Supreme Court of the State."

In the case of Elmendorf vs. Taylor, (10 Wheat. 157), this Court said: "This Court has "uniformly professed its disposition, in cases de-"pending on the laws of a particular State, to "adopt the construction which the Courts of the "State have given to those laws. This course "is founded on the principle, supposed to be "universally recognized, that the judicial de-"partment of every government, where such "department exists, is the appropriate organ for "construing the legislative acts of that "government. Thus, no Court in the "universe, which professed to be governed by "principle, would, we presume, undertake to say "that the Courts of Great Britain or of France, "or of any other nation, had misunderstood their "own statutes, and, therefore, erect itself into a "tribunal which should correct such misunder-"standing. We receive the construction given "by the Courts of the nation as the true sense of "the law, and feel ourselves no more at liberty "to depart from that construction than to depart "from the words of the statute. On this princi-"ple, the construction given by this Court to the "Constitution and laws of the United States is "received by all as the true construction; and "on the same principle the construction given "by the Courts of the several States to the Legis-"lative Acts of those States is received as true, "unless they come in conflict with the Constitu-

"tion, laws, or treaties of the United States. If, "then, this question has been settled in Kentucky "we suppose it to be rightly settled." In the case of South Ottawa vs. Perkins, 4 Otto, 267, the Court say: "It is declared by the Judiciary "Act as a fundamental principle, that the laws "of the several States, except where the Consti-"tution, treaties, or statutes of the United States "shall otherwise require or provide, shall be "regarded as rules of decision in trials at com-"mon law in Courts of the United Sates in cases "where they apply." Section 34. "And this "Court has always held that the laws of the "States are to receive their authoritative con-"struction from the State Courts, except "where the Federal Constitution and laws "are concerned; and the State Consti-"tutions, in like manner, are to be con-"strued as the State Courts construe them. "This has been so often laid down as the proper "rule, and is in itself so obviously correct, that it "is unnecessary to refer to the authorities If, "therefore, the law in question had never been "passed upon by the State Courts, the Courts of "the United States would nevertheless be bound "to give to the Constitution of Illinois the same "construction which the State Courts give to it, "and to hold a pretended Act of the Legislature "void, and not a law which the State Courts "would hold to be so. Otherwise, we should "have the strange spectacle of two different tri-"bunals, having co-ordinate jurisdiction in the "same State, differing as to the validity and exis-

"tence of a statute of that State, without any "power to arbitrate between them. In speaking, "however, of their jurisdiction as being co-ordi-"nate, it is only meant that one has no power "to enforce its decisions upon the other. As a "matter of propriety and right, the decision of the "State Courts on the question as to what are the "laws of the State is binding upon those of the "United States."

Again, in the same case, the Court said: "As "a matter of propriety and right, the decision of "the State Courts on the question as to what are "the laws of the State is binding upon those of "the United States."

In Christy vs. Pridgeon, 4 Wall. 203, the Court say: "The interpretation of a statute within the "jurisdiction of one State becomes a part of the "law of that State, as much so as if incorporated "into the body of it by the Legislature. If, therefore, "different interpretations are given in different "States to a similar local law, that law in effect "becomes, by the interpretation so far as it is a "rule for our action, a different law in one State "from what it is in the other."

McKeen vs. Delancy's Lessee, 5 Cranch, 31.

Van Rensselaer vs. Kearney, 11 Howard, 297.

Bank of Hamilton vs. Dudley's Lessee, 2 Pet., 492.

The United States vs. Morrison, 4 Pet., 124.

Thatcher, et al. vs. Powell, et al., 6 Wheat., 119.

Harpending vs. The Dutch Church, 16 Pet., 455.

Walker vs. State Harbor Commissioners, 17 Wall, 648.

Olcott vs. The Supervisors, 16 Wall, 678.

Arcadia vs. The State, 19 Wall, 635.

Tioga R. R. Co. vs. Blowsburg, etc., R. R. Co., 20 Wall, 137.

Secombe vs. R. R. Co., 23 Wall, 109.

Bayley vs. Maguire, 22 Wall, 215.

V.

Where there are conflicting decisions by the State Court, the Federal Court will follow the last decision of the State Court, even when so doing the Federal Court has to reverse its own decision.

In the case of Green vs. Neal's Lessee, 6 Pet., 291, the question before this Court was the construction of a Statute of Limitations of the State of Tennessee. The Court reviewed and affirmed the authorities which established the doctrine of the binding force upon the Federal Courts of a decision of a State Court, construing a local law, when no Federal question was involved, and thereupon expressed its conclusion in the following language :

" The same reason which influences this Court " to adopt the construction given to the local " law, in the first instance, is not less strong in

"favor of following it in the second, if the State
"tribunals should change the construction. A
"reference is here made, not to a single adjudi-
"cation, but to a series of decisions which shall
"settle the rule. Are not the injurious effects on
"the interests of the citizens of a State as great,
"in refusing to adopt the change of construction,
"as in refusing to adopt the first construction?
"A refusal in the one case as well as in the
"other has the effect to establish, in the State,
"two rules of property.

"Would not a change in the construction of a
"law of the United States, by this tribunal, be
"obligatory on the State Courts? The statute
"as last expounded would be the law of the
"Union; and why may not the same effect be
"given to the last exposition of a local law by
"the State Court? The exposition forms a part
"of the local law, and is binding upon all the
"people of the State and its inferior judicial tri-
"bunals. It is emphatically the law of the State,
"which the Federal Court while sitting within
"the State, and this Court, when a case is
"brought before them, are called to enforce. If
"the rule as settled should prove inconvenient
"or injurious to the public interests, the Legis-
"lature of the State may modify the law or re-
"peal it. If the construction of the highest judicial
"tribunal of a State form a part of its statute
"law, as much as an enactment by the Legisla-
"ture, how can this Court make a distinction
"between them?"

See also Leffingwell vs. Warren, 2 Black, 603.

Quotations might be multiplied, but the above show:

First, That the Federal Courts have uniformly adopted the decision of the State Tribunal respectively in the construction of their statutes; and

Second. That the last decision of the State Court is taken, and considered as the true exposition of the local or State law.

VI.

The Supreme Court of California HAS ALREADY *determined and adjudged that the defendant, the Contra Costa Water Company, under the words, "other great necessity," in its charter, is bound to furnish to defendant the City of Oakland, without charge, water for irrigating public squares and parks, flushing sewers, and other like municipal purposes.*

Spring Valley Water Works vs. San Francisco, 52 Cal. 111.

The charter of said Contra Costa Water Company, being a State statute, in no way trenching upon any of the powers of the National Government, or any rights guaranteed or protected by the Constitution or treaties of the United States, the construction placed upon it by the Supreme Court of California is here conclusive.

VII.

The appellant insists that the construction relied upon by the appellee is but a *dictum*, or, if

otherwise, that the Supreme Court of California had decided the same point the other way in a prior case, and that the Federal Court is authorized to exercise its own judgment as to which decision it will follow.

But so to do would be to ignore the doctrine laid down by this Court in Green vs. Lessees of Neal, 6 Pet., in the following words: "*The same* "*reason which influences this Court to adopt the* "*construction given to the local law in the first in-* "*stance, is not less strong in favor of following it* "*in the second if the State Tribunal should change* "*the construction.*"

VIII.

There is no conflict in the decisions of the Supreme Court of California concerning the meaning of the words, "other great necessity," as such words are used in the Charter of the defendant, the Contra Costa Water Company.

The case of San Francisco vs. Spring Valley Water Works [39th Cal., p. 473] was an action brought by the then plaintiff to restrain the defendant in that case from cutting off and depriving the city of the supply of water for general municipal purposes. The plaintiff there claimed the right to tap any of the pipes of the defendant, and take such water as it might require for the purpose of extinguishing fires, and for any and all other municipal uses *free* of charge. This right the plaintiff had theretofore exercised, but the defendant denying the right, except for the purpose

of extinguishing fires, notified the plaintiff of its intention to cut off the water supply for all other purposes. Upon filing the complaint, an order to show cause was made, and the defendant filed a demurrer and answer. Upon the hearing, the demurrer was sustained and the injunction denied. Thereupon final judgment was entered for defendent, and plaintiff appealed to the Supreme Court of California,

The Spring Valley Water Works was the assignee of the San Francisco Water Works, a corporation having a franchise to introduce water into the City of San Francisco, and also of George Ensign and his associates, who had a similar franchise.

It was claimed in that case that each of the franchises thus assigned was held subject to the express obligation to furnish the plaintiff water as claimed in its complaint.

In that case on appeal the Supreme Court of California said: "It is clear to our minds that "the rights of plaintiff, in this respect, must be "ascertained entirely from the conditions in the "grant to George Ensign and his associates. By "the third section of the Act to extend the rights "and privileges of the San Francisco City Water "Works, passed April 8, 1863, it is provided that "any rights, privileges or immunities, enjoyed by "the Spring Valley Works, should be held and "enjoyed by the San Francisco City Water "Works. If, therefore, the Spring Valley Water "Works, as assignees of George Ensign and his

"associates, were not required to furnish the city "with water for municipal purposes, free of "charge, it was an immunity to which the San "Francisco City Water Works became entitled "by that Act."

The Legislature of California, in 1858, passed two separate Acts relative to the organization of Water Companies—one special; the other general in scope.

Under the former, George Ensign and his associates, and their assigns, were granted the right to lay down pipes in the streets of the City and County of San Francisco, and to introduce, distribute and sell water in said city and county.

The third section of that Act (which is the only part of the Act that was involved in the case in 39th California above-mentioned, or that throws any light upon this inquiry) is set out in the Appendix at page one Section 4 of the General Act above referred to is set out also in the Appendix at page one.

The other parts of the general Act throw no light upon this inquiry.

There is still another Act, to wit: the Act of April 8th, 1863, referred to in the case last mentioned. This Act is set out in the appendix at pages 2 and 3. An examination of the general Act of 1858, under which the defendant, the Contra Costa Water Company, is organized, in comparison with the special Act of 1858—the Ensign Act—and also with the Act of April 8, 1863, shows that neither the Ensign Act, the

special Act of 1858, nor the Act of 1863 contain the words, "In case of fire or other great neces-"sity," while the general Act of 1858, under which the defendant, the Contra Costa Water Company is organized, does contain those words.

The Supreme Court in that case (39 Cal. 478) held that the Spring Valley Water Works, doing business under authority of the *special* Act of 1858, and the general Act of 1863, was only obliged to furnish water free of charge for the purpose of extinguishing fires, until water should be introduced by some other party, and as it did not appear that any other party had introduced water into the city, it followed that said Company was only required to furnish water free of charge to extinguish fires. There was no construction whatever of the general Act of 1858, which is involved in this suit, and under which the defendant, the Contra Costa Water Company, is organized and doing business, nor does it appear that said Act was discussed by either Court or counsel.

The same case came before the Supreme Court of California, in a second appeal.

See 48 Cal., 509.

A rehearing on that appeal having been granted, the opinion delivered on the first hearing of that appeal is not reported, and on the rehearing on that appeal the Court say:

"On the former appeal and at the first hearing "of the present appeal, it was assumed, by both "Court and counsel, that the rights and

"obligations of the defendant were to be "ascertained by reference to the Act of April "23d, 1858, authorizing Ensign and his "associates to lay down water pipes in the "streets of San Francisco. But on the rehear-"ing the point is made for the first time by the "defendant, that the Ensign Act is unconstitu-"tional and void, and, consequently, can confer "no rights on the plaintiff, nor impose any duties "on the defendant;" therefore the Court proceeded to consider this point, and in an elaborate opinion sustained it. The defeated party not being satisfied, another petitition for a rehearing was filed, and the Court again, at the following term, discussed the point at length and denied the petition. It will be noticed, that in all these opinions the only points discussed are

First. The unconstitutionality of the Ensign Act, so called. That is the special Act of 1858, and

Second. The further point, that conceding it to be unconstitutional, the Spring Valley Water Works, as successor of the San Francisco City Water Works, was still liable to supply water without charge for all municipal purposes, under the city ordinances by which the last named corporation acquired its rights.

In that case the counsel did not discuss, nor did the Court consider or decide, the meaning of the phrase "in case of fire or other great necessity," contained in only the general Act of 1858.

In other words, there was in that case no oppor-

tunity or attempt by either Court or counsel to define the words "other great necessity," those words not being in either of the Acts then construed.

So far from these words being construed, on the contrary, Mr. Justice McKinstry, in his concurring opinion, and apparently for the purpose of forestalling any dispute as to whether said phrase had been construed, said: "*I express no* "*opinion as to the precise meaning of the phrase* "'*other great necessity.*'"

48 Cal. 531.

And so, when the question was subsequently presented, long after all the hearings and decisions in the 39 and 48 of Cal., above cited, the Court, construing its own language used in those former cases, held that it had not construed the words "other great necessity" (as said words are used in the charter of defendant, the Contra Costa Water Company), and thereupon proceeded in the 52 Cal. to place a construction upon these words.

Spring Valley Water Works vs. San Francisco 52, Cal. 111

In that case it appears that the Spring Valley Water Works threatened to shut off water theretofore supplied for watering plazas, streets, and for like municipal uses, and the Board of Supervisors passed a resolution empowering and directing the Mayor in case the water company carried out its threat, to make connections with the pipes of the company whenever water should be required for municipal purposes; and an ordinance

was introduced with similar and further provisions and passed to print. Whereupon, the water company presented a petition to the Supreme Court of California alleging among other things :

(*a*) That it, the company was only bound to supply water, free of charge, for extinguishing fires, and setting up the prior litigation (reported in 48 Cal.) hereinbefore considered;

(*b*) That the judgement in said case settled the rights of the parties in favor of the company, and that the matter was *res adjudicata*, and,

(*c*) The subsequent Acts of the Board of Supervisors of the city and county, including the threatened passage of the ordinance so introduced.

The petition closed with a prayer for a writ of prohibition.

See appendix, pp. 9 to 20.

In answer to this petition, the City and County of San Francisco set up two grounds why the writ of prohibition should not issue in the case. The city claimed:

1st. That the writ of prohibition was a prerogative writ, whose only office was to restrain subordinate Courts and inferior judicial tribunals from exceeding their jurisdiction; and that as the Board of Supervisors was a legislative body having a discretion to pass ordinances, the Court ought not to interfere with its legislative discretion in advance, on the hypothesis that it intended to pass an illegal ordinance, especially as it could

not be determined in advance what its intention as a legislative body was; and

2d. That the past litigation theretofore had in the case of the City and County of San Francisco vs. The Spring Valley Water Works, 48 Cal., 493, left the question of the construction of the phrase, "other great necessity," open; that, therefore, the city and county *was not estopped* from claiming water free for ordinary municipal purposes, and that the city and county, having the right to the water claimed, had the right to take the measures alleged to secure it in case the petitioner should shut it off; and, also, that for the last reason, there was not a proper case for the prohibitory writ.

Appendix, pp. 23, 24, 25, 32 to 38, 59, 60 and 61.

both grounds were distinctly and squarely presented by the record and relied upon by the defendant, and the latter ground more especially fully argued by counsel.

After briefly referring to the first point, the Court say: "The parties have requested the Court "to place an interpretation upon the language of "the fourth section of the Act of 1858, which is "as follows: 'And shall furnish water to the "extent of their means to such city and county, "or city or town, in case of fire or other great "necessity, free of charge.' It is claimed by peti-"tioner that it has been adjudged by this Court "that the city and county is not entitled to water "from the pipes and mains of petitioner, 'free of

"charge,' for any municipal purpose, except "for the extinguishment of fires; that such "is the effect of the judgment in San "Francisco vs. Spring Valley Water Works, 48 "Cal., 493. A reference to the report of that case "will show that the question discussed in the "briefs, and the only question considered in the "opinion of the Justices, was the validity "or constitutionality of the 'Ensign Act.' It "seems to have been assumed by counsel "and Court that a determination that the "'Ensign Act' was void, must involve a "complete reversal and not a modification of the "judgment of the District Court. Counsel did "not there indicate their respective views (in "case it should be held that water corporations "were not compelled to furnish water for all pur-"poses) as to the purposes for which the com-"pany might charge for the water, and as to the "purposes for which it might be compelled to "furnish water free of charge. It is said, how-"ever, that inasmuch as the complaint was filed "by the city and county to enjoin a threat on "the part of the Spring Valley Water Company "to cut off water for all purposes, except in case "of fire, and as judgment was rendered for de-"fendant, such judgment necessarily involved a "determination that the company was entitled to "refuse to furnish water free of charge, for any "other purpose than the extinguishment of fires. "It is plain from the opinions therein rendered, "that no such result was contemplated by the "Judges. In the opinion, on rehearing, of Mr.

" Justice Crockett, concurred in by Mr. Justice
" Niles, and in this particular by Mr. Justice
" Rhodes, the obligation of the Spring Valley
" Company is described as being an obligation to
" furnish water free of charge 'in case of fire *or*
" *other great necessity.*' (Page 527.) And Mr. Jus-
" tice McKinstry, in his concurring opinion,
" (page 531), says: The general law required
" all water companies to furnish water to
" the extent of their means, and free of
" charge, to the city or town to which
" water was conducted, 'in case of fire or
" other great necessity.' I express no opinion as
" to the precise meaning of the phrase 'other
" great necessity.' On the former appeal, and
" before I came to the bench, it was held by all
" the Justices qualified to sit in this case, that
" these words did not include every municipal
" purpose.

" Under these circumstances, even if the techi-
" cal effect of the judgment in San Francisco vs.
" Spring Valley Water Works is broader than
" the views expressed by the Justices would war-
" rant, I am of opinion that the case should be
" held to be authority only to the extent of a de-
" termination that the company is not bound to
" furnish water to the city free for *all purposes*"

" But the claim of the city and county in the
" action of The City and County of San Fran-
" cisco vs. The Spring Valley Water Works was
" based on an assertion that the rights and duties
" of the defendant, so far as furnishing water to
" the city is concerned, were created and con-

" trolled by the Ensign Act, and by the transfer
" from the City Water Works to the Spring Val-
" ley Company; and that by virtue of said act
" and transfer, the obligation was imposed on the
" Spring Valley to furnish water for *all* purposes.

" The pleading on the part of the plaintiff did
" not allege that there were any 'great necessi-
" ties' for which the water should be furnished
" free; and in the absence of such allegation the
" judgment of the Court only determined that
" the city and county was not entitled, as it
" claimed, to free water for all purposes.

" The decision and judgment did, however,
" determine that the defendant was bound to
" furnish water to the city and county free of
" charge 'in case of fire or other great necessity.'
" The meaning of these words is still an open
" question."

After determining that the meaning of the words "In case of fire or other great necessity" was then an open question, and that that phrase had not been theretofore construed, the Court proceeded to consider and discuss at length the meaning of those words, and in conclusion said:

" It is impossible further to classify these uses,
" or to say that one of them is a 'greater' neces-
" sity than another, and under the well established
" rule that when there is even serious doubt in
" respect to the interpretation of a law confer-
" ring franchises on a corporation or person, it
" should be construed against the party claiming
" the privilege, and for the benefit of the public.

"I am constrained to say that it is the duty of "the Spring Valley Water Works to furnish "water free to the city and county in case of "fire, and also in case it is demanded for irriga-"ting the parks and squares, watering the streets, "flushing the sewers: and in case of any other "demand based on a requirement which is inci-"dental to the discharge by the Supervisors of "their duty as local legislators, except where it "is to be used by human beings for family pur-"poses."

Thus the Court, in the 52d California, construed its own prior decision and declares in the most positive terms that it had not therefore intended to and had not therefore given an *authoritative* or *any* construction to the disputed words.

A petition for a rehearing was filed and the rehearing denied. The order denying the rehearing is set out at page 116 of the appendix

Now, we respectfully submit

(*a*) That the Court in which a given decision is rendered is better qualified than any other Court to determine the precise questions decided in such decision; and

(*b*) That if the decision of the State Court, construing a local or State law, when no Federal question is involved, is binding upon the Federal Court, then under the same rule certainly a decision of a State Court [as to what questions have been decided in a previous decision of such Court] is binding upon the Federal Courts.

IX.

The appellant's position is untenable when he claims that the decision in the 52 of Cal. above cited is obiter dictum in so far as it construed the words, "In case of fire and other great necessity."

A judicial opinion is one that is on question before the Court.

Ram's Legal Judgment, p. 88.

In speaking of *dicta* this Court. in Cohen's vs. Virginia, 6 Wheat., 399, said: "It is a maxim not "to be disregarded, that general expressions in "every opinion are to be taken in connection "with the case in which those expressions are "used. If they go beyond the case they may be "respected, but ought not to control the judgment "in a subsequent suit when the very point is "presented for decision. The reason of this "maxim is obvions. The question actually be-"fore the Court is invcstigated with care, and "considered in its full extent. Other principles "which may serve to illustrate it are considered "in their relation to the case decided, but their "possible bearing on all other cases is seldom "completely investigated."

As we have before shown, two points were made in that case (52 Cal. 111), one a technical point, as to the form of the remedy, the other as to the merits of the case. The Court had jurisdiction of the case.

The question as to the propriety of issuing the writ was not jurisdictional. The Court had

authority to issue the writ in a proper case; and the question was not whether the Court had jurisdiction to issue the writ, but whether the petition presented a proper case for its exercise. The petition and the answer thereto, distinctly and squarely presented to the Court, the question as to the true construction of the words now under consideration. It was a question presented by the record, relied on by counsel, and much more fully argued than the question of the remedy.

And when two or more points of law are thus argued under a professional duty, and are actually decided under official jurisdiction and responsibility, it is difficult to see why, in a logical point of view, the opinion given is not equally conclusive upon all points considered and decided. Otherwise no Court in any given case could ever decide on one appeal more than one point, if it should happen that the first point was decided adverse to the proceedings theretofore taken in the case.

Again, there can be no force in the proposition of the appellant that one point in a decision is decided *before* another point in that decision. There is no such thing as a "first" and "second" and "last" point, chronologically, in any decision. Because the decision never becomes such until it is filed as an entirety, and the last line of it is filed and therefore judicially uttered, as soon as the first line. The whole decision is but one utterance of the judicial determination; and all of it becoming the judicial determination at the same instant—that is, upon being filed.

Hon. J. P. Hoge, one of the counsel for plaintiff in that case, at page six and seven of his printed argument said:

" Now, the object of all these proceedings, if " your Honors please, seems to be to procure an " early decision by this Court—the Court of last " resort—of all the matters of dispute between " the city and county, and the corporation; a de- " cision which will settle all the questions in- " volved between these two contending parties; " and which will authoritatively determine beyond " further controversy, the whole matter, and set- " tle the rights of the public and the rights of the " corporation; and which will put an end to any " further difficulty or discussion in relation to " those rights; with which decision, no matter how " it may go, either party will be satisfied, the " rights of the public will be protected, and the " rights of the private incorporators will be " equally protected.

" With this decision there is no further dispo- " sition, I apprehend, on either side, to make a " future quarrel.

" Now, then, under these circumstances, I have " not understood that there was any question " made as to the form or applicability of the " remedy sought by the original proceeding in " this Court."

Again, at page 9, he said: " Now, then, it will " be seen, if your Honors please, that these plead- " ings, stripped of the verbiage and useless aver- " ments and prolix statements with which they

"are filled, it will be seen by your Honors, if you "take the trouble to read them – present a single "question; that under the previous corporation "Act of 1858, this question stands first: that the "City and County of San Francisco is entitled to "take the water of the Spring Valley Water "Company and appropriate it, free of charge, "without compensation, to all the municipal uses "of the city, without limit."

The Court, in 52 Cal., 111, might just as well have decided the case upon the second point, if well taken, without noticing the first, as upon the first without noticing the second; or it might, if it thought proper, as it did, place its decision upon both grounds. It is very seldom that any case reaches an appellate Court in which the record does not present *two* or *more* points, either of which, if sustained, would determine the case, and the Court decides them all. In such case it can no more be said that the decision on one point, rather than upon the other, is *obiter*.

After the decision had been rendered in 52 Cal., 111, a petition for a rehearing upon the second point *only* was filed, supported by three elaborate printed arguments. In the argument filed by Hon. Chas. N. Fox and Hon. J. P. Hoge, at pages one and two appears the following plea for a correct interpretation of the words "in case of fire ~~and~~ or other great necessity," to wit: "In presenting a petition for rehearing in "this cause on behalf of the Spring Valley "Water Works, it is not done so much with the

" hope, or even desire, to procure a reversal of
" the real judgment recently rendered by the
" Court quashing the writ, and ordering the pro-
" ceeding dismissed (which is a matter of little
" consequence to either party) as to secure cor-
" rect interpretation of the words of the statute
" requiring the petitioner to furnish water to the
" city free of charge 'in case of fire or other
" great necessity.' Both parties have united in
" asking the Court to interpret these words, and
" when there shall be a final adjudication as to
" their meaning, and the force of the statute
" which attempts to impose that obligation, both
" parties are disposed to abide by such judgment
" without further litigation on the subject. *For*
" *these reasons although perhaps a review of the*
" *decision so far as it bears upon that subject, will*
" *not result in an actual change of the order of the*
" *Court in reference to the writ, we feel impelled*
" *to ask the Court to reconsider its opinion, so far*
" *as it relates to the construction of these words,*
" *and whether they still are open to construction*
" *and the force of the statute in which they are*
" *found.*"

Again, the Hon. F. G. Newlands, of counsel for petitioner, in his printed argument in support of the petition for a rehearing in that case, at page 32, said;

"I respectfully submit that a rehearing should be
" granted, or at all events that all of the decisions
" of the Court, save that relating to the remedy,
" should be withdrawn, thus leaving open for

" future considerations the questions here dis-
" cussed."

Here we have the most solemn statements of counsel to the effect that the question of practice was an unimportant and immaterial question, and that the real point in issue was the construction of the statute. In the language of the Court in Starr vs. Stark (2 Sawy., 639) we say:

" In fact this (second) ground of decision is, if
" possible more distinctly brought out than the
" other, and is suggested as a ground free from
" doubt, even if the other were doubtful. Both
" points were fairly and directly presented by the
" record, and the decision might as well have
" been put upon one as the other, and both are
" distinctly determined.

" We can, therefore, no more say that one was
" not directly adjudicated than the other."

After a full and exhaustive argument of the question presented by the petition for a rehearing, the petition was denied. And thedecision, as reported in the 52 Cal., 111, stands as the solemn and final judgment of the Court.

X.

When a question of general interest is fully discussed and submitted by counsel, and the Court decides the question with a view to settle the law, a decision made under such circumstances cannot be deprived of its authority *even by showing that it was not called for by the record.*

Upon this latter point the Court, in the case of

Alexander vs. Worthington, 5 Md. 488, say: "In Maryland it is usual to limit the judgment "to the question of right involved, but where a "question of general interest is supposed to be "involved, and is fully discussed and submitted "by counsel, the Court frequently decides the "question with a view to settle the law; and it "has never been supposed that a decision made "under such circumstances could be deprived of "its authority by showing that it was not called "for by the record. * * * * All that is "necessary in Maryland to render the decision "of the Court of Appeals authoritative on any "point decided, is to show that there was an "application of the judicial mind to the precise "question adjudged, and this, we apprehend, is "the rule everywhere."

How much less, then, can it be deprived of its authority when, as in the case under consideration, it was not only a question of general interest, but also *was called for* by the record and in the pleadings, and was fully discussed and submitted by counsel.

We would not have felt justified in inserting in the "Appendix" the voluminous petition and answer in the case, reported in the 52d Cal. 111, but for the fact that that was the *only way* to inform this Court accurately as to *what were the issues* in that case.

XI.

Finally, we respectfully submit that we have hereinbefore shown:

First—That the appellant has not legal capacity to maintain this suit.

Second—That the final decision of the Court of last resort of a State, construing a local law, not involving any Federal question, is binding and conclusive upon the Federal Courts.

Third—That the phrase, "in case of fire ~~and~~ or other great necessity," used in the charter of the defendant, the Contra Costa Water Company, was for the first time construed by the Supreme Court of California, in the 52 Cal., 111, and then had a meaning put upon its words, and that too in a case in which the construction of that phrase was in issue, argued by counsel, and considered and decided by the Court, as is shown by the records.

Fourth—That the question as to the construction of this phrase was the very point to which was directed the argument of counsel and the attention of the Court.

Fifth—That on the petition for a rehearing of the case in which that phrase had been construed the only question addressed to or considered by the Court was as to the correctness of their former interpretation of that phrase, so that "the very point" decided "was actually before" the mind of the Court, and "was investigated with care and "considered in its fullest extent."

Six—That the interpretation of that phrase was a matter of great public concern, and was sought and procured as such with a view to settle the law in that respect.

Seven—That such interpretation was by the Court of last resort of the State of California, and it involved no Federal question and was not *obiter dictum.*

Eight—That under that decision it was adjudged and determined that it was the legal duty of the defendant, the Contra Costa Water Company, to perform the acts, that is, to furnish the water free of charge, to prevent which is the only relief sought by complainant through his bill of complaint.

Wherefore the judgment of the Circuit Court ought to be affirmed.

HENRY VROOMAN,
Counsel for Appellee,
The City of Oakland.

APPENDIX.

SEC. 3. The Chief Engineer of the Fire Department, under the direction of the Board of Supervisors of said City and County of San Francisco, shall have the right to tap any pipes so laid down, and connect hydrants therewith, and receive water therefrom for the extinguishment of any fire or fires, during the pendency of the same, free of charge, to the full capacity of said water works, up to and until such time as water shall be introduced into said city and county by some other person or persons, and thereafter said Ensign and his associates, or their assigns, shall furnish, for fire and other municipal uses, their quota or proportion of whatever water may be produced by them, or may be introduced by any other person or persons.

Approved April 23, 1858

SEC. 4. All corporations formed under the provisions of this Act, or claiming any of the privileges of the same, shall furnish pure fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity,

free of charge; and the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the Sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this Act and the laws and Constitution of this State.

Approved April 22, 1858.

SEC. 1. In accordance with the recommendation of the Board of Supervisors of the City and County of San Francisco, expressed in resolution number twenty-three hundred and twenty-four, passed January fifth, eighteen hundred and sixty-three, and approved January sixth, eighteen hundred and sixty-three, in relation to the San Francisco City Water Works, the said Company are hereby relieved and discharged from any and all obligations whereby it has agreed to pay the said City and County of San Francisco five per cent. of its gross earnings.

SEC. 2. It is hereby provided that should any

other company, person or persons, excepting the City and County of San Francisco, receive permission to introduce water for the purpose of supplying the said city and county therewith, no more favorable terms shall be granted to such company, or person, than are now enjoyed by the San Francisco City Water Works, without extending the same to the latter company.

SEC. 3. It is hereby provided that any rights, privileges or immunities now enjoyed by the Spring Valley Water Works, by virtue of an Act entitled an Act to authorize George H. Ensign and others (owners of the Spring Valley Water Works) to lay down water-pipes in the public streets of the City and County of San Francisco, approved April twenty-third, eighteen hundred and fifty-eight, which are more favorable than the terms heretofore granted to the San Francisco City Water Works, shall be held and enjoyed by the said company.

SEC. 4. This act shall take effect from and after its passage.

Approved April 8, 1863.

5588.

In the Supreme Court of the State of California.

THE SPRING VALLEY WATER WORKS,

Petitioner,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, A. J. BRYANT, the Mayor thereof, AUGUST DRUCKER, C. B. EDWARDS, THOMAS BRYAN, JNO. H. WISE, JNO. P. SHINE, FRED. W EATON, GEO W. HAYES, FLEET F. STROTHER, THOMAS BOYCE, JNO. C. ROBERTS, FRED. A. GIBBS, and D. A. MCDONALD, the Board of Supervisors of said City and County, H. H. ELLIS, the Chief of Police, and JOHN HAGAN, Superintendent of Public Streets and Highways in said City and County,

Respondents.

CITY AND COUNTY OF SAN FRANCISCO, SS.:

CHARLES WEBB HOWARD, being duly sworn, deposes and says: That he is the President of the Spring Valley Water Works, the petitioner above named, and the party beneficially interested in the subject matter of this proceeding, and who has been and will be injured by the wrongs and injuries hereinafter referred to.

That he makes this affidavit for and on behalf of said petitioner, and is personally informed, and has personal knowledge of the facts hereinafter stated.

That the said Spring Valley Water Works is a corporation organized and existing under the laws of the State of California, and particularly and especially under an Act of the Legislature of the State of California, entitled "An Act for the incorporation of Water Companies," approved April 22, 1858.

That said corporation was organized on the nineteenth day of June, A. D. 1858, under the Act of the Legislature aforesaid, for the "introduction of pure fresh water into the City and County of San Francisco, and to any part thereof, from any point or points, place or places, for the purpose of supplying the inhabitants of said city and county with the same, and to do and transact all such business relating thereto as may be necessary and proper; not, however, to be inconsistent with the laws and Constitution of the State of California."

That said corporation has ever since existed, and still continues to exist, and has ever since been engaged, and still is engaged in the business of supplying the inhabitants of the City and County of San Francisco with pure fresh water.

That the said corporation is purely a private corporation, in which neither the nation or State, or any county or municipality in the nation or State, has invested any money, or has any pecuniary interest whatever.

That the said City and County of San Francisco is not, and her officers, or any of them are not, either under the Act of the Legislature aforesaid under wh ch the petitioner is incorpor

ated, or any other law of this State, or under any contract or agreement whatever, entitled or authorized to tap any of the pipes or mains of said petitioner, or to interfere with its property or works in any manner whatever, except that she may give reasonable direction as to the mode and manner of exercising the right given by said Act of the Legislature, of laying pipes in the streets, ways and alleys of said city, for the purpose of conducting water therein.

That it is not the duty of said petitioner, under the said Act of the Legislature, or any other law, to supply the said City and County of San Francisco with water for any of its ordinary daily uses or purposes, or for any municipal purpose which can be anticipated with certainty as likely to transpire except the extinguishment of fires, free of charge, or without just compensation therefor, or until arrangements have been made on the part of said city and county for the payment of compensation therefor.

That the said petitioner has, and for ten years last past has had, pipes and mains laid in and through the streets, lanes and alleys of said city, and has been and is supplying water to the inhabitants of said city through the same, and they are constantly filled with a supply of water for the use of, and for sale to, the inhabitants of said city and county, and under such a pressure that when tapped, and service connections are made therewith, the water in said pipes, which is and at all times has been the private property of said petitioner, may be drawn therefrom by any per-

son or persons or corporation making such connection.

That the said City and County of San Francisco is a municipal corporation organized and existing under the laws of the State of California, and has so been for more than twenty years last past.

That the said A. J. Bryant is the Mayor of said city and county.

That the said August Drucker, C. B. Edwards, Thomas Bryan, John H. Wise, John P. Shine, Fred. W. Eaton, George W. Hayes, Fleet F. Strother, Thomas Boyce, John C. Roberts, Fred. A. Gibbs and D. A. Macdonald are and constitute the Board of Supervisors of said city and county.

That the said H. H. Ellis is the Chief of Police of said city and county.

That the said John Hagan is the Superintendent of Streets and Highways in said city and county.

That in and prior to the years 1868–9 the said city and county was receiving and taking from the pipes and mains of the petitioner, water not only for the extinguishment of fires, but also for all other municipal uses and purposes, the irrigation of her parks and squares, the use of her hospitals, jails, prisons, school houses and public offices, and the flushing of her sewers, without rendering or paying any compensation therefor. That about the close of the year 1868 the petitioner notified the Mayor and Board of Supervisors of said city any county that it would

cut off the water taken and used by said city and county for all municipal purposes, except the extinguishment of fires, unless arrangements were made by said city and county to pay for the same.

That thereupon the said city and county, by direction of its said Mayor and Board of Supervisors, brought an action against the petitioner, in the District Court of the Fifteenth Judicial District of the State of California, in and for the said City and County of San Francisco, which action was entitled "The City and County of San Francisco, plaintiff, vs. The Spring Valley Water Works, defendant," and was numbered on the register of said Court No. 4660; and on the tenth day of February, A. D. 1869, the said city and county filed its complaint in said cause, wherein it claimed and asserted that it, the said city and county, was entitled to water for all the municipal purposes of said city and county, from the pipes and mains of this petitioner, the defendant therein, free of charge, and prayed the Court for an injunction restraining and perpetually enjoining the said defendant from cutting off the water as it had proposed and threatened to do, and caused summons to be duly issued thereon, and served upon the defendant; and thereafter such proceedings were duly and regularly and legally had in said cause, as that the defendant therein, the petitioner in this proceeding, appeared and answered in said cause, and denied that said plaintiff, the said City and County of San Francisco, was entitled to water from the pipes and mains of said defendant, free of charge,

for any of its municipal uses or purposes, except the extinguishment of fires during the pendency of the same; admitted that it had threatened and did intend to cut the water off from said city and county for all other municipal uses and purposes, unless arrangements were made to pay for the same; claimed the right to do so, and prayed that said plaintiff's prayer for injunction be denied, and said plaintiff's bill be dismissed with costs. That thereafter said cause was duly, regularly and legally tried in the said District Court on its merits, and fully argued, and the said District Court gave and entered judgment therein, denying plaintiff's prayer for an injnnction, and dismissing plaintiff's bill with costs. That from said judgment the said plaintiff appealed to this Court, and at the April Term, A. D. 1874, of this Honorable Court, after full and elaborate argument upon the merits and upon all the questions of law and fact involved, this Court rendered its judgment and decision therein, which decision is reported in the 48th volume of the reports of this Court, at pages 493 *et seq.*, wherein and whereby it was adjudged and determined by this Court that the said City and County of San Francisco, the plaintiff in said action, was not entitled to water from the pipes and mains of the defendant, this petitioner, free of charge, for any municipal purpose, except for the extinguishment of fires, during the pendency thereof, and the judgment of the said District Court denying plaintiff's prayer for an injunction, and dismissing plaintiff's bill, was affirmed in all its parts, this

Court thus holding, and deciding in legal effect, that the said Spring Valley Water Works had the right to cut off the water for all such municipal purposes as the same was then taken and used, except the extinguishment of fires. That thereafter and in due time, the said plaintiff petitioued this Court for a rehearing in said cause, upon the ground, among other things, that all the municipal purposes of said City and County, for which she used and required the water from the mains and pipes of the defendant, were cases of great necessity, and at the July Term, 1874, of this Court, the Court rendered its decision upon said application, and denied the same, affirming its former judgment in the case, and the said judgment and decision has become final and absolute, and is now the law of the case, and the said City and County of San Francisco is now and ever since has been estopped from claimlng, pretending, or asserting, that she is entitled to water from the mains or pipes of the said Spring Valley Water Works, free of charge for any of the ordinary municipal uses and purposes of said City and County, or for any of the purposes for which she was then using the same, or likely to need the same, except the extinguishment of fires.

That said City and County of San Francisco having ever since refused, and still refusing to pay for the water used from the mains or pipes of the petitioner for any of its municipal uses or purposes, the petitioner, on the twenty-sixth day of March, 1877, in the exercise of the right so adjudged to belong to said petitioner, notified the Mayor and Board

of Supervisors of said City and County, of its intention to cut off the water from said City and County, for all municipal uses and purposes for which she was receiving the same from the mains and pipes of petitioner, except the extinguishment of fires, unless steps were immediately taken towards the making of payment for the water used in the past, and the making of a proper contract for the future supply, and prosecuted to completion as speedily as the same could be done under the law; and on the first day of April, 1877, no steps having been taken by said City and County toward settlement or payment for the past, or towards making a contract for the future supply, petitioner, as it had and has the lawful right to do, commenced to cut off the water in manner and form aforesaid, and did cut the same off from the public parks and squares of said City, except Golden Gate Park, so that the said City could not take water from said mains and pipes for the irrigation of said parks and squares, and proposed to continue the work of cutting off such supply, in such manner as to do as little injury to private persons as possible, until it should have cut off the water in its mains and pipes from all the places where the said City and County takes or receives the same for ordinary municipal purposes other than the extinguishment of fires.

That thereupon, and on the second day of April, A. D. 1877, the Board of Supervisors of said City and County, in utter disregard of the decision and judgment of this Court aforesaid, and of the rights of this petitioner, at a meeting of said Board

held on that day, passed a resolution in the words and figures following, to wit:

"WHEREAS, The Spring Valley Water Works have arbitrarily stopped the supply of water heretofore used for the improvement of the public squares, while the question of the right of the City and County to the free use of water for municipal purposes is still in abeyance; therefore,

"*Resolved*, That the Mayor of this City and County be, and he is hereby, authorized and empowered to have connections made with the pipes and mains of the Spring Valley Water Works, wherever water is required for municipal purposes, and if necessary, to have said connections, so made, protected from all interference, until a final determination of the respective rights of the City and County and said corporation."

And on the same day, and at the same meeting, and in like disregard of law, and of the judgment and decision of this Court, and of the rights of petitioner, the said Board of Supervisors passed to print, and has now before it in the due course of passage, and threatens and intends to finally pass, so that the same shall become an ordinance of said City and County, a certain ordinance in the words and figures following, to wit:

"SECTION 1. A sufficient supply of pure, fresh water for the following purposes is hereby ordered and declared to be greatly and indispensably necessary at all times to the City and County of San Francisco: that is to say, water in sufficient quantities for the use of the Hospitals and Alms House, the House of Correction, the Jails, Prisons

and Industrial Schools, the Public Schools, the Engine Houses and Fire Department for fires, and for the use of the firemen, the horses and engines; all public buildings, Courts and offices, the plazas, parks and public gardens and grounds, and any other case of fire or other great necessity within the meaning of Section 549 of the Civil Code of the State.

"SEC. 2. It shall be the duty of the Mayor to cause and procure all necessary connections to be made with the pipes and mains of any and all corporations heretofore or hereafter formed for the purpose of furnishing or supplying pure, fresh water to the City and County of San Francisco, or the inhabitants thereof, and engaged in said business, in order to carry out the provisions of the Act. And he may, when necessary, call upon the police force to aid in making said connections.

"SEC. 3. Any person who shall wilfully obstruct, or who shall cause others to obstruct, the Mayor or any other person in carrying out the provisions of this order, or who shall cut off or attempt to cut off the water necessary to any of the buildings or purposes herein provided for, or cause others to do so, shall be deemed guilty of misdemeanor, and, on conviction, shall be punished accordingly."

That it is not true, as recited in the preamble to said resolution, that "The question of the right of the City and County to the free use of water for municipal purposes is still in abeyance," so far as relates to the right to such free use from the pipes, mains or works of this petitioner; that said question has already been tried, adjudged, deter-

mined, and is now *res adjudicata* as between the said City and County and this petitioner, by the judgment of this Court, in manner and form aforesaid, and there is not now, and has never been, since the judgment and decision aforesaid, any suit or proceeding pending in this or any other Court, between said parties, or to which they or either of them were or are privies, in which said question is involved, or open to review.

That the said Mayor has already approved the said preamble and resolution, and has notified this deponent that uuless the said petitioner immediately turned on the water at Portsmouth Square, one of the public parks or squares of said City, he, the said Mayor, should take steps to cause the same to be done, and the necessary connections therefor to be made, and thereafter and before the filing of this petition has caused such connection to be made, by means of which the said City and County is now taking and appropriating to its own use the private property of petitioner, without rendering any compensation therefor, and is threatening to make connection as to take the water in manner and form aforesaid for all the other parks and squares in said City.

That none of the uses or purposes for which the said City and County takes or receives, or has ever taken or received, or now claims the right to take or receive water from the mains or pipes of petitioner are other or different from the uses and purposes for which she was taking and receiving the same prior to and at the time of the bringing of the action for injunction so as afore-

said decided in this Court, and the right to which was adjudged and passed upon in said case.

That the passage of said preamble and resolution was an act in excess of the jurisdiction of the said Board of Supervisors, and the said Mayor had no jurisdiction to approve the same; that under it the said Mayor has not, nor has any other officer of said City and County, or person, any jurisdiction or right whatever to make connections with the pipes and mains of the petitioner, or take water therefrom; yet, nevertheless, if the same is done. it will work great and a constantly increasing injury to petitioner, and for it the petitioner will have no plain, speedy or adequate remedy, in the ordinary course of law.

That the passage of said ordinance is and will be in excess of the jurisdiction of said Board of Supervisors; upon its face it will legalize the appropriation of the private property of petitioner to public use without just or any compensation therefor, or without the hope or opportunity of securing compensation therefor otherwise than by long and vexatious litigation, if indeed it can be recovered at all, when taken and used without a specific contract for the payment of compensation therefor, and will make it a crime for the petitioner, its agents or servants, to take any steps to prevent such appropriation of its property. That for such wrong and injury, the said petitioner has and will have no plain, speedy or adequate remedy in the ordinary course of law.

That the said defendant and its said Mayor and Board of Supervisors threaten, that if petitioner

does cut off the water from the places where the said City is accustomed to take the same for any of its corporate uses and purposes, the said defendant and its officers will turn the same on again, and for that purpose will themselves make connections with the pipes and mains of petitioner, and will use the police force of said City, and the force of the Superintendent of Streets and Highways, to turn the same on, and maintain the connections aforesaid. That in the presence of such a force this petitioner will be powerless to protect its property, or to exercise the right which this Court has adjudged that it possesses, of refusing to furnish water for the ordinary municipal uses of said City and County, without compensation therefor; and if it should be finally adjudged as claimed by many men learned in the law, that for supplies so appropriated and used by or furnished to a municipality without a specific contract for the payment therefor no recovery could be had, petitioner would be utterly remediless in the premises, and in any event the petitioner would be thus despoiled of its property to the amount and value of at least five thousand dollars per month with no compensation therefor, except such as might be recovered at the end of numerous suits and long and tedious litigation; that such appropriation would be in violation of the Constitution and laws of the United States and of this State, and such act of appropriation, and of hindrance of the petitioner in the exercise of the lawful right aforesaid would be in defiance of the judgment

and decision of this Court; yet, nevertheless, the petitioner has and would have no plain, speedy or adequate remedy against the same in the ordinary course of law.

And affiant states the following circumstances, which, in the opinion of the affiant, and of counsel for petitioner, render it proper that the writ applied for in this case should issue originally from this Court, to wit.:

First—The said writ is sought in furtherance of the judgment of this Court, and to protect the rights of the petitioner, as adjudged and determined by this Court in the said case of the City and County of San Francisco vs. The Spring Valley Water Works, above referred to.

Second—It is and for several years has been, the boasted policy of the said City and County and its officers, and of a large proportion of the public press of said City, to litigate the rights of this petitioner, in every conceivable form, and if possible to annoy and defeat the petitioner in the enjoyment of its property and rights, by numerous vexatious suits, and long and tedious litigation. Even a special counsel for said City and County, in a recent publication over his own signature, went so far as to announce his determination to continue the contest with this petitioner until he had procured a decision that the City was entitled to the water free of charge, which he declared himself confident of being able to do, if he could ever "get an honest decision from an honest bench," thus implying that no such decision had ever been rendered by such a

bench upon that question, or increasing the distrust in the integrity of the bench. That, in pursuance of said policy, it is certain that no matter from what Court said writ may originally issue, it will have ultimately to be passed upon by this Court.

Third—That the judgment and decision of this Court has been so long and persistently falsified and misrepresented by the representatives of said City and County, and by a large portion of the public press, that a large mass of the people have been deceived thereby, and led to believe, and they do believe that it is the duty of the petitioner to furnish water free of charge for all municipal purposes, and that this Court has never decided otherwise, and an intense public feeling has heen excited upon the subject, to such a degree that the judgments and decisions of the local Courts in favor of the petitioner, involving directly or indirectly any right between petitioner and defendant, are treated and are received with derision, and the judges who render them are made the subjects of public contumely and abuse both among the people and through the press. That the question is one of great public interest, by reason of the excitement and prejudice so engendered as aforesaid, and if the writ be issued on the order of a single judge, as it must be if issued by an inferior Court, it will not command the respect and confidence to which it would be entitled, and that it would command if issued from this Court, and will subject the judge who orders the same to such unfriendly and unjust

criticism through the press and otherwise, as cannot do less than impair the public confidence in the District Bench.

Fourth—That if said writ is issued originally from this Court instead of from one of the District Courts, the public good will be best subserved thereby, expensive delays will be avoided, the ends of justice will he most speedily accompltshed, private and all other interests will be promoted, the rights of property be best protected, and a multiplicity of suits and arguments avoided.

Wherefore affiant, on behalf of the said Spring Valley Water Works, prays that the *Writ of Prohibition* issue out of and under the seal of this Court, commanding the said respondents, and each of them, and all persons acting under them, to desist and refrain from interfering with the Spring Valley Water Works, its agents or servants, in the exercise of its rights to cut off, and in cutting off, the water from its mains or pipes from any place where the same is taken for the ordinary municipal uses and purposes of said city and county, except the extinguishment of fires, unless the said city and county shall have first made arrangements to render compensation therefor, and from any and all attempts to make connections with the pipes and mains or works of said petitioner for the purpose of taking water therefrom without the knowledge and consent of said petitioner, and to desist and refrain from passing any ordinance authorizing or empowering the Mayor, or any other officer or person, to

make connections with the pipes or mains of said Spring Valley Water Works, for the purpose of taking water therefrom for any of the ordinary municipal uses or purposes of said city and county, except the extinguishment of fires, without the consent of said Spring Valley Water Works; that the said respondents shall show cause before this Court, on a day and at a place to be named by the Court, why said writ shonld not be made absolute and perpetual, and for such other and further or other or further, order and relief in the premises as may be just and lawful, and that petitioner have judgment for its costs of this proceeding.

CHAS. WEBB HOWARD.

Subscribed and sworn to before me this fourth day of April, A. D. 1877.

J. H. BLOOD, [L. S.]
Notary Public.

CHAS. N. FOX, Attorney for Petitioner.
J. P. HOGE, and
LLOYD & NEWLANDS,
Of Counsel.

Endorsed Filed April 5. 1877
D. B. Woolf Clerk

In the Supreme Court of the State of California.

THE SPRING VALLEY WATER WORKS,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO,
ET ALS.

City and County of San Francisco, ss.

Now come the City and County of San Francisco, A. J. Bryant, Mayor thereof, August Drucker, C. B. Edwards, Thomas Bryan, John H. Wise, John P. Shine, Fred. W. Eaton, George W. Hayes, Fleet F. Strother, Thomas Boyce, John C. Roberts, Fred. A. Gibbs, and D. A. McDonald, the Board of Supervisors of said City and County, H. H. Ellis, the Chief of Police, and John Hagan, Superintendent of Public Streets and Highways thereof, respondents in the above entitled proceeding, by Wellington C. Burnett, City and County Attorney of the City and County of San Francisco, their attorney, and make answer and defense to the petition of "the Spring Valley Water Works," herein filed.

The defendants deny each and every allegation in said petition by said Spring Valley Water Works filed in this Court, except such as is hereinafter specially admitted.

Respondents admit that Charles Webb Howard is the President of the Spring Valley Water

Works, and that he made the affidavit to said petition for and on behalf of said corporation.

Respondents admit, and aver, and charge that the said Spring Valley Works is a corporation, organized and existing under the laws of the State of California, and particularly and especially under an Act of the Legislature, entitled "An Act for the incorporation of Water Companies," approved April 22, 1858, and that said corporation was organized on the 19th day of June, 1858, under the Act of the Legislature aforesaid, for the introduction of pure fresh water into the City and County of San Francisco, for the purpose of supplying the inhabitants of said city and county with the same; and further, that said corporation claims and exercises all the privileges of said Act.

Respondents further admit, and aver, that said Spring Valley Water Works has, ever since said June 19, 1858, existed and continues to exist, and has ever since been engaged in the business of supplying the inhabitants of the City and County of San Francisco with pure fresh water.

Respondents deny that said Spring Valley Water Works is a purely private corporation, as is in said petition alleged, but, on the contrary, allege and show that said corporation was organized for the purposes above specified, and has always claimed and exercised all the privileges set forth in said Act of the Legislature of April 22, 1858; and that it has repeatedly, and whenever it has desired to do so, exercised the right of eminent domain so as to purchase, appropriate

and take possession of the property of citizens upon making compensation therefor, and to use and hold all such lands and waters as it required, under the provisions of Section 2 of said Act, extending to it the privileges of condemning and appropriating lands and waters under Sections 27, 28 and 29 of "An Act to provide for the incorporating of Railroad Companies," passed April 22, 1853.

Respondents traverse, and deny in every particular the allegation of the petition that the City and County of San Francisco is not, and her officers or any of them are not, authorized to tap any of the pipes or mains of said petitioner, or to interfere with its property or works, as is therein set forth. On the contrary, respondents aver and show that said city and county is, and her officers and any and all of them are, by said Act of the Legislature of April 22, 1858, under which the Spring Valley Works is organized, and by the laws of this State, entitled to tap and connect with any of the pipes or mains of said petitioner, and to take water therefrom for the use of said City and County of San Francisco, "in case of fire or other great necessity," which respondents aver comprises and embraces all the water used by said city and county for any purpose whatsoever, within the last ten years, and all the water ever used by said city and county, except that used for a certain marble ornamental fountain, hereinafter more particularly described and mentioned.

Respondents further traverse and deny, in every particular, the allegation in said petition con-

tained, "that it is not the duty of said petitioner to supply the said City and County of San Francisco with water for its ordinary daily uses or purposes, or for any municipal purpose which can be anticipated with certainty as likely to transpire, except the extinguishment of fires, free of charge, or until arrangements have been made on the part of said city and county for the payment of compensation therefor."

But, on the contrary, respondents show and aver that it is, and at all times since its organization has been, the duty of the said "Spring Valley Water Works," under the said Act of April 22, 1858, and the laws of this State, to furnish and supply said City and County of San Francisco with a full supply, to the extent of its means, of pure, fresh water, in case of fire or other great necessity, free of charge.

And respondents further aver and show that under Section 4 of said Act of April 22, 1858, said city and county is and has always been entitled to have and receive of and from said Spring Valley Water Works water to the extent of the means of said corporation for the use of the Fire Department of said city and county in extinguishing fires, and for the use of its engine houses, horses and men, to fill the boilers of the engines, and all absolutely necessary purposes of said Department of said city and county, as water in case of fire, free of charge. Also, for the necessary use of the prisons, hospitals and almshouses, houses of detention and correction, for the public or common schools, for all public buildings and

offices essential to said city government, for cleansing the streets and sewers and watering the shrubs, trees and grass in the necessary gardens, parks and grounds of said city and county, and for any other use essentially and indispensably necessary to the proper regulation aud preservation of the health and comfort of said city and county.

Respondent admits and avers that said petitioner has, for more than ten years, viz.: for nineteen years last past, had pipes and mains laid in and through the streets, lanes and alleys of said city and county, and has been, and is, supplying water to the inhabitants of said city and county through the same, and that they are constantly filled with a supply of water for the use of and for sale to the inhabitants of said city and county and under such a pressure, that when tapped and service connections made therewith, the water in said pipes may be drawn therefrom by any person or persons or corporation making such connection.

But respondent denies that said water in said pipes is, or at any time has been, the private property of said petitioner, or that said petitioner has any ownership, or right to sell or collect pay for said water, except under and in accordance with said petitioner's franchise, acquired under and by virtue of said Act of the Legislature of April 22d, 1858, under which said corporation was organized, and now has its existence.

And respondents aver that of said water that always has been, and is in said pipes of the Spring

Valley Water Company, that the City and County of San Francisco is, and always has been, the owner of a sufficient quantity for the use of said city and county in case of fire and other great necessity, and especially for the use of its Fire Department, hospitals, jails, schools and the other purposes hereinbefore specifically named.

Respondents admit and aver that the City and County of San Francisco is a municipal corporation, organized and existing under the laws of the State of California, and has been so for more than twenty years past; also, that the said A. J. Bryant is Mayor thereof; also, that the said August Drucker, C. B. Edwards, Thomas Bryan, John H. Wise, John P. Shine, Fred. W. Eaton, George W. Hayes, Fleet F. Strother, Thomas Boyce, John C. Roberts, Frederick A. Gibbs and D. A. MacDonald are, and constitute the Board of Supervisors of said city and county; that the said H. A. Ellis is the Chief of Police, and that the said John Hagan is the Superintendent of Public Streets and Highways of said city and county.

Respondents admit and aver that in and prior to the years 1868–9, viz.: from the year 1858 to the year 1869, the said city and county was receiving and taking, and did continuously receive and take from the pipes and mains of the Spring Valley Water Works, water not only for the extinguishment of fires, but also for such other municipal purposes as the irrigation of her parks and squares, the use of her hospitals, jails, prisons, school houses and public offices, and the flushing of her sewers, and for all other necessary muni-

cipal purposes, without rendering or paying any compensation therefor.

But respondent denies that the City and County of San Francisco, prior to the years 1868–9, or ever at any time, was receiving or taking, or that she ever received or took from said petitioners' pipes, water for all other or for any other municipal uses or purposes than those above named, or that said city and county ever received from said pipes and mains any water except in case of fire or other great necessity, within the meaning of Sec. 4, of said Act of April 22, 1858, except as hereinafter expressly admitted.

Respondent admits and avers that the San Francisco City Water Works, a corporation duly organized under the laws of this State, for the purpose of supplying said city and county with water, did, prior to the year 1868 9, erect an ornamental fountain upon Portsmouth Square, one of the public squares of said city and county, and did maintain and supply the same with water for a certain period of time; and further that said San Francisco City Water Works subsequently, but before said year 1868–9, to-wit: on the 13th day of February, 1865, was sold out and transferred with all its franchises and property to the said Spring Valley Water Works, which became and was, and now is, the assignee, owner and successor in interest of the same. But respondents aver that said ornamental fountain and the water for its supply was not demanded by the city and county from said corporation as water due to the city in case of fire or other great necessity free of

charge, but was erected and furnished under and according to the terms of Sec. 11 of a certain special contract between said City and County of San Francisco and the San Francisco City Water Works, known as Order No. 46, and confirmed by the Legislature of California by the Act entitled "An Act to ratify and approve Order No. 46, of the Board of Supervisors of the City and County of San Francisco, approved August 6, 1857." Approved March 18, 1858.

And respondents aver, that with the single exception of the water supplied to said marble fountain, no water has ever been used by said city and county for the adornment or ornamentation of said city and county, or for the amusement or pleasure of the inhabitants thereof, or for any artistic or esthetic purpose whatsoever or for any purpose not absolutely and indispensably necessary to the proper administration and discharge of the necessary functions of said city government, and preservation of the health, lives or property of the people of said city and county in their public or aggregate capacity.

And respondents aver, that from the first introduction of water into said city and county, by the San Francisco City Water Works, which took place on the 16th day of September, 1858, until the year 1868-9, the City and County of San Francisco continued, without interruption, to take and receive, and the said San Francisco City Water Works and the said Spring Valley Water Works, its successor in interest, continued to furnish and deliver to said city and county, a suffi-

ciency of water for the use of said city and county, in case of fire, and for the other great necessities hereinbefore specified, to-wit: for hospitals, jails, schools, plazas, and the other purposes of great and indispensable necessity mentioned hereinbefore, and that the said water was furnished and used during said period of ten years without any manner of objection on the part of said water companies, or either of them, and without any claim or pretense of a right to payment or compensation whatsoever; and respondents aver that said city and county used said water as it has always used the water of said corporations, and each of them, under claim of right, as water due to her free of charge in case of fire and other great necessity, as provided by said Act of April 22, 1858, and the Constitution and laws of this State.

Respondents aver, that on the 13th day of February, 1865, the said San Francisco City Water Works, by deed of conveyance of that date, duly executed under its seal, and delivered, granted and conveyed to the Spring Valley Water Works all its property and franchises, and that said respondents have ever since held, enjoyed and exercised the same.

And respondents aver and charge that the said Water Companies, and each of them, when furnishing said water for the purposes aforesaid, except the water for said ornamental marble fountain, acquiesced and agreed during all of said period, to-wit: for said period of ten years, that said water, and every part thereof, was fur-

nished under and in accordance with the requirements of said Company's charters of incorporation, as due, to said city and county, free of charge.

Respondents admit that the City and County of San Francisco brought an action against the petitioner in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, which action was entitled, "The City and County of San Francisco, Plaintiff, vs. The Spring Valley Water Works, Defendant," and that it was numbered on the register of said Court No. 4660, and that on the 10th day of February, A. D. 1869, the said city and county filed its complaint in said action.

But respondents deny that said city and county, or that any one in her behalf, ever made any allegation, claim, assertion, demand or prayer for relief against said Spring Valley Water Works, other than that set forth and contained in the second amended complaint of said city and county in said case, filed on the 17th day of October, 1871, a copy of which is hereto annexed and made part hereof, and marked "Exhibit No. 1."

Respondents admit and aver that said Spring Valley Water Works did appear in said cause. and filed a demurrer in law to the sufficiency of said complaint, and at the same time an answer denying that said city and county was entitled to water from said Spring Valley Water Works, free of charge, for any municipal purpose whatsoever, except *for the extinguishment of fires during the pendancy of the same.*

But respondents aver that the denials and averments made by said Spring Valley Water Works in its said answer were based upon its pretended claim to hold and exercise its rights and franchises under and by virtue of an Act of the Legislature, passed April 23, 1858, entitled, "An Act to authorize George H. Ensign and others (owners of the Spring Valley Water Works), to lay down water pipes in the public streets of the City and County of San Francisco," and commonly known as "the Ensign Act." And respondents aver that a copy of the said answer of the Spring Valley Water Works to said complaint of the City and County of San Francisco, is hereto annexed, marked "Exhibit No. 2," and made part of this answer by reference.

Respondents admit that said action of said City and County of San Francisco vs. The Spring Valley Water Works, No. 4660, was afterwards tried in said Fifteenth District Court, and that said District gave and entered judgment thereon, denying said injunction.

Respondents allege that from said judgment and decision last-named, said city and county took an appeal to the Supreme Court of the State. That said appeal was duly argued and submitted, and that at the July term of said Court in the year 1870, said appeal was decided in favor of said city and county, and said cause was remanded to said Fifteenth District Court for further proceedings, which decision is duly published and appears in the 39th volume of California Reports, at page 473, and following.

And respondents allege and show that by said decision the Supreme Court held and adjudged that the liability of said Spring Valley Water Works to furnish free water to said city and county was prescribed by Section 3 of the Ensign Act. And, that it not appearing to the Court from the pleadings or proceedings in the case that any other company or corporation than said Spring Valley Water Works had ever at any time introduced water into said city and county, that it followed that until the happening of such contingency the Spring Valley Water Company was only bound to furnish said city and county with water free of charge, for the extinguishment of fire during the pendency of the same

And respondents allege that at the time, and long before the commencement of said suit, No. 4660, the said San Francisco City Water Works had introduced water into said city and county, to-wit: on the 16th of September, 1858; and that upon the return of said cause to said Fifteenth District Court, the complaint therein was duly amended, and said fact was duly alleged; and, further, that after said amendment, which appears in said second amended ~~answer~~ complaint hereto annexed, marked "Exhibit No. 1," said cause was again tried in said Fifteenth District Court; whereupon said Fifteenth District Court gave judgment to the effect that said city and county take nothing by said proceeding. A copy of which judgment is hereto annexed, marked "Exhibit No. 3," and made part hereof by reference.

And respondents allege that the effect of said

judgment was no other and no more than to deny the application of the City and County of San Francisco for a perpetual injunction, according to the prayer of its complaint in said action, the effect of which prayer, if granted, was, and would have been to restrain the Spring Valley Water Works from cutting off water from said city and county, for any, every and all possible or imaginable purposes, for which said city government might choose at any time to demand and apply water. And said judgment decided nothing more than that the City and County of San Francisco is not entitled to free water from said Water Company for every possible or imaginable purpose, but only that she is entitled to it, in case of fire or other great necessity.

And respondents aver and charge that afterwards, to-wit: on the 24th day of January, 1873, the City and County of San Francisco made by its counsel a motion for a new trial in said case, No. 4660, in said Fifteenth District Court, upon a statement duly prepared and allowed; a copy of which statement on motion for a new trial, with the order of the Court denying the same and the appeal therefrom, and other documents connected therewith, is hereto annexed, marked "Exhibit No 4," and made part of this answer by reference.

And respondents further admit and aver that said motion for a new trial being denied by the said Fifteenth District Court, the said City and County of San Francisco did appeal from the order denying the same, and from the judgment rendered in said action as is alleged in the peti-

tion from said Fifteenth District Court to the Supreme Court, when the same was duly argued at the April term of this Court in the year 1873. And that at the ~~April~~ July term of said year, this Court rendered a decision in favor of said City and County of San Francisco, and against said Spring Valley Water Works, and did order and adjudge that the judgement of said Fifteenth District Court should be reversed, and did adjudge and decide that the Spring Valley Water Works held its franchises and privileges under the so called "Ensign Act" aforesaid, and was obliged to furnish water to said city and county *for all municipal purposes free of charge.*

And respondents further admit and aver, that at the April term of this Court, A. D. 1874, a rehearing having been before that time granted in said case on the petition ~~of~~ and application of said Spring Valley Water Works, this Court once more, and anew, rendered its judgment and decision therein, modifying and changing its former views and the reasons therefor, which is the same decision and no other, alleged and referred to by the Spring Valley Water Works in its petition herein as reported in the 48th volume of the Reports of this Court, at pages 493, *et seq.*

Respondents deny that in or by said judgment or decision it was by this Court adjudged or determined that the City and County of San Francisco, the plaintiff in said action, was not entitled to water from the pipes and mains of the defendant in said suit, the Spring Valley Water Works, free of charge, for any municipal purpose, except

for the extinguishment of fires during the pendency thereof; and respondents deny that this Court has ever rendered such a decision, at any time or in any case.

Respondents admit that this Court did enter an order affirming the said judgment of said Fifteenth District Court, but deny that in doing so it either in intention or in legal effect held or decided that the Spring Valley Water Works had the right to cut off the water from said city and county for all municipal purposes, as the same was then taken and used except for the extinguishment of fires, or that it held, decided or intended to hold or decide, any such thing.

Respondents, on the contrary, aver and charge that this Court, in affirming said judgment, intended to decide and did decide that the prayer of said City and County of San Francisco for a perpetual injunction restraining said Spring Valley Water Works from cutting off water for every possible municipal purpose was greater than the rights of said city and county entitled it to, and greater than the laws of the State and the charter of said water company required of said Spring Valley Water Works; that said company was only bound to furnish said city and county with water, free of charge, in *case of fire or other great necessity*, but this Court did not undertake to settle, at that time, ~~even~~ or in that proceeding, what purposes or uses were included under that head.

And respondents further aver that in rendering said decision, this Court adjudged and decided

that both the "Ensign Act" and the special privileges claimed by the San Francisco City Water Works were unconstitutional and void, and that said Spring Valley Water Works was organized under and had the rights, privileges and franchises created by the general law, entitled "An Act for the Incorporation of Water Companies," approved April 22, 1858, and none other, and that it was bound by the duties and obligations of said Act, and each, all and every of them; and further, that among its duties and obligations it was bound by said Act to furnish water to the extent of its means to the City and County of San Francisco, "*in case of fire or other great necessity, free of charge.*"

And respondents aver and charge, that all of the water that is now, and for the last ten years past has been, furnished by said Spring Valley Water Works and used by the City and County of San Francisco, and all the water furnished by said San Francisco City Water Works and by said Spring Valley Water Works, without protest, objection or demand for compensation, and used by said city and county from 1858 to 1869, except the water for said ornamental marble fountain hereinbefore mentioned, was water furnished to and used by said city and county, "in case of fire or other great necessity."

And respondents aver, affirmatively, that no water has ever been furnished by either of said water companies, or used by said city and county, that was not absolutely indispensable to said city and county, either in case of fire, or for the

schools, hospitals, prisons and plazas, flushing the sewers, or some other equally great necessary purpose as herein more specifically described.

Respondents aver that no water has ever been furnished or used as aforesaid for any ornamental fountain, except the one named above, nor for any cascade, artificial lake, or water piece, nor for any public bath, nor for baths attached to any City Hall office or other public building, or any where except at hospitals for the sick, nor for any canal, either for transportation or pleasure, nor for furnishing power for the driving of machinery, nor for elevators, nor for prison manufactories, or any such beneficial, but as respondents admit, dispensable purpose.

Respondents admit that after said decision rendered by this Court at the April term, 1874, on said first rehearing, that the City and County of San Francisco in turn petitioned for a rehearing, and that the same was denied, and the judgment last above mentioned remained in force—but denies that said judgment has become final and absolute, except as to what was therein decided as hereinbefore alleged, to wit: That the claim of the City and County of San Francisco for free water from the Spring Valley Water Works, for water for every possible and conceivable municipal purpose, was not warranted by the law, but that she was only entitled free of charge to water "in case of fire, or other great necessity" And this respondent's claim is and has become final, and settles the law of the case.

And respondents deny that said city and

county is now or ever has been estopped, or in any manner debarred from claiming or pretending or asserting that she is entitled to water from the mains or pipes of the said Spring Valley Water Works free of charge, for any of the ordinary municipal uses and purposes of said city and county, or for any of the purposes for which she was then using the same, or likely to need the same, except the extinguishment of fires; but, on the contrary, respondents aver that said city and county is and always was entitled under the laws of the State to have and receive of and from said Spring Valley Water Works, water to the extent of said Company's means, "in case of fire or other great necessity," free of charge. to wit: for the purposes hereinbefore named, as being due to said city and county under Section 4 of the General Corporation Laws of this State.

And respondents aver that this law was settled in said case of the City and County of San Francisco vs. the Spring Valley Water Works, reported in the forty-eighth volume of California Reports, at page 493, and has become final and conclusive, and that said Water Company is and ought to be estopped and forever barred from asserting or claiming the contrary.

Respondents admit and aver that said City and County of San Francisco has refused in the past and still refuses to pay for any of the water used by it from the Spring Valley Water Company's mains or pipes, as it had the right to do, and alleges that its reason for such refusal was and is because of its right to said water, as in

this answer set forth and specified. Respondents also admit and aver, that said Spring Valley Water Works, on the 26th day of March, 1877, notified the Mayor and Board of Supervisors of its intention to cut off, and threatened to cut off, the water from said city and county, for all municipal uses except the extinguishment of fires during the pendency thereof, as is set forth in said petition. And respondents admit and aver, that said Spring Valley Water Works commenced to cut off said water in pursuance of said notice and threat, and did cut the same off from the public parks and squares of said city and county, (except Golden Gate Park), and proposed and threatened to continue cutting off the supply until it should have cut off all the water, in all its mains and pipes, where the city and county takes or receives the same for all purposes except for the extinguishment of fires during the pendency thereof.

And respondents aver that said Spring Valley Water Works threaten to cut off, and intend, if permitted, to cut off the connection of its pipes and mains with the engine and hose houses of said city and county, and its Fire Department generally, except during fires actually burning, claiming and pretending that it is not obliged to furnish water to said city and county for the uses of said houses, or for any purpose of the said Fire Department of said city and county, except such as is used for the extinguishment of fires during the pendency thereof.

And respondents aver that said Spring Valley

Water Works have no right or authority to cut off said connection with the various institutions and departments of said city and county, and that its offer and threat so to do is a violation of its duty as a water company organized under said Act of April 22d, 1858, of the laws of this State and of respondents' rights.

Respondents admit that the said Board of Supervisors have passed the ordinances and resolutions named and set forth in said petition, and that the Mayor has signed the same, and that they and each of them are now in force, but deny that the same was done in disregard of the decision and judgment of this Court, or the rights of said petitioner, the Spring Valley Water Works, or of the law.

On the contrary, respondents aver that the said resolutions and ordinances were passed in the lawful exercise of the power and authority of said Board of Supervisors, and are valid and legal regulations for the delivery of water under Section 4 of the Act to provide for the formation of water companies, passed April 22, 1858, and of Section 549 of the Civil Code, and of the Constitution and laws of the State of California, and are binding upon the Courts of law, and upon said Water Company, and upon all the citizens and inhabitants of this State.

Respondents admit that the Mayor of said city and county will, if necessary so to do, and if said Water Company cuts off or attempts to cut off said water, obey and enforce said resolutions and ordinances regulating the delivery of water

as aforesaid, and will, if said water is cut off, turn on the same whenever and wherever it shall be necessary to the city and county, "in case of fire, or other great necessity," as in this answer is more specifically set forth, the same being, as respondents aver, due to and the property of said city and county free of charge. But respondents deny that said city and county, or said Mayor, or said officers, or any of them, intends to interfere with said company's pipes or mains, or will interfere with or molest the same except in so far as shall be necessary to secure to said city and county a sufficient supply from said pipes and mains of water in case of fire or other great necessity.

Respondents admit and aver that none of the uses or purposes for which the said city and county takes or receives, or has ever taken or received, or even claims the right to take or receive water from the mains or pipes of said Spring Valley Water Works are other or different from the uses and purposes for which she was taking the same prior to, and at the time of the bringing the action for an injunction, except the water hereinbefore specified as furnished by said San Francisco City Water Works for said ornamental marble fountain in Portsmouth Square.

Respondents deny that the passage of said preamble and resolution or said ordinance was in excess of the jurisdiction of said Board of Supervisors, and aver that said Board of Supervisors had the power to pass the same, and that said Mayor had jurisdiction to approve the same, and has the power under the said resolution and

ordinance to make the necessary connection with said main and pipes to secure at all times, for said city and county, water to the extent of said Company's means, in case of fire or other great necessity; and deny that the same will work any injury to said water company, or that it is entitled to or ought to have any remedy at law or otherwise

Respondents admit that a large mass of the people of the City and County of San Francisco believe that it is the duty of the Spring Valley Water Company to furnish said city and county with water, free of charge, for all necessary municipal purposes, and that said mass of people do believe that this Court has never decided otherwise; but respondents aver that they have good reason for such belief, for said water company is bound, under its Act and charter of incorporation and the laws of this State, as hereinbefore shown, to furnish water to the extent of its means to said city and county in case of fire or other great necessity, free of charge, and this Court has so decided, and has never decided otherwise Respondents admit that an intense public feeling exists upon said subject in said city and county, but aver that it is the natural and legitimate result of the wrongful, wicked and unconscionable acts, and the overbearing and unscrupulous conduct of said Spring Valley Water Works and its officers towards said people, in deliberately attempting to avoid the plain duty imposed upon it by its charter, to furnish said water due to said city in case of fire and other great necessity, free

of charge, coupled with its outrageous, extortionate and oppressive charges and exactions against the inhabitants of said city and county for water furnished them for domestic and business purposes.

And respondents allege, that said Spring Valley Water Works for a long time past, to-wit: ever since the year 1869, has unlawfully, and in defiance of its duty under its said Act of incorporation, denied and repudiated its obligation to said City and County of San Francisco, and has sought in all manner of ways to compel said city and county to pay said water company for water used from said company's pipes and mains, in case not only of fire, but of all other great necessity.

And desiring to make known to this Court precisely the nature of the demands that have been made upon the treasury of said city and county by the Spring Valley Water Works, and for the non-payment of which said water company has threatened to cut off the said water, and has cut off the same in part, and was proceeding to cut off the rest when said resolution and ordinance ~~was~~ were passed.

Respondents allege, and give this Court to understand, that at this time said Spring Valley Water Works is engaged in prosecuting two suits in said Fifteenth District Court, for the purpose of enforcing the payment of the demands in dispute between said water company and said city and county. That one of said suits is entitled, The Spring Valley Water Works *vs* Mon-

roe Ashbury, Auditor of the City and County of San Fraucisco, and is a proceeding to obtain a peremptory writ of mandate against said Auditor to compel him to allow, audit and register in the books of his office, a demand in favor of said company against the treasury of said city and county, for the sum of $92,000 claimed to be due to said company from said city and county, for water furnished for all municipal purposes, except for the extinguishment of fires during the pendency thereof, for 46 months from the 1st day of February, ~~1859~~ 1867, to the 30th day of November, ~~1863~~ 1872, at $2,000 per month, making $92,000.

And respondents aver that said demand for $92,000 was made out and presented by said Spring Valley Water Works to the Board of Supervisors of said City and County, and received, allowed, and ordered paid by said Board, under a pretended belief on the part of said Water Company and said Board, acting collusively together, that this Court, by its said decision in the case of the City and County of San Francisco *vs.* The Spring Valley Water Works, reported in the 39th Volume of the Reports of this Court, p. 473, had adjudged that said Spring Valley Water Works was only obliged to furnish said City and County with water, free of charge, for the extinguishment of fires during the pendency thereof, when, in truth and in fact, this Court decided, in said case reported in the 39th Cal~~ifornia~~, to the following effect, and not otherwise, to-wit: That, by the terms of the Ensign Act, the Spring Valley Water

Company was bound to furnish water to the said City and County for the extinguishment of fires, free of charge, during the pendency thereof, up to and until such time as some other company or companies should introduce water into said City and County; when, and from which time, said company was to furnish it free for all municipal purposes.

And respondents aver that at the very time said decision was rendered, and long prior thereto, to-wit: From the 16th day of September, 1858, water had been and was introduced into said City and County by said San Francisco City Water Works; which fact was then well known to both said Spring Valley Water Works and to said Board of Supervisors and the presentation of said demand and its allowance were fraudulent. In order that the Court may know and be advised of the purposes for which said water was taken and used, respondents aver and show that a part or portion of the water so furnished was water supplied to the engine and hook and ladder houses, hose houses and fire alarm establishments of said City and County, and necessarily used by the Fire Department thereof, in the due course of its administration, to-wit: For filling the boilers of the steam fire engines, to generate steam, as a motive power, in the extinguishment of fires; also to supply the horses necessarily kept to draw said engines and machinery, and for the health, comfort and convenience of the officers and men necessarily employed in said service. That said water so furnished and used was water due, under

the Act aforesaid, to the City and County of San Francisco from said plaintiff free of charge—being water due to said City and County in case of fire, and made of said $92,000 demand no less than ten per cent. of the whole, being $200 per month, amounting to $9,200 in all.

And respondents aver that another part of said demand was for water furnished the City and County Jail, to the Industrial School, and the various houses and places of detention and correction belonging to said City and County, for the necessary uses of the prisoners and other p rsons detained therein, and was greatly and indispensably necessary to their health, comfort and cleanliness, and to the City and County in its duty of maintaining said establishments. That said water was due to the City and County aforesaid from the plaintiff, under the law as aforesaid, free of charge, as water in case of great necessity other than fire, and that said water amounted in said demand to no less than $200 per month, making in all $9,200, or ten per cent of the whole.

Respondents aver that another part of said demand was for water furnished to the City and County Hospitals and Almshouses, for the necessary use of the sick and persons being treated and maintained therein, and the nurses, physicians and assistants in charge thereof and attached thereto, and was greatly and indispensably necessary to their health, comfort and well being, and to the City and County aforesaid in its duty in maintaining the said establishments. That said water

was due to the City and County of San Francisco from the plaintiff, the "Spring Valley Water Works," under the said law and corporation Acts, free of charge, being water in case of great necessity other than fire, amounting to more than $300 in each and every month for which said demand is made, and amounting in the aggregate to not less than $13,800.

And respondents aver that another part of said demand No. 895 was for water furnished to the public and common schools of said City and County, and consumed by the pupils, teachers and employes thereof, and was greatly and indispensably necessary to them, their health, comfort and cleanliness, and to said City and County in the maintenance of said establishments. That the same was due to said City and County of and from the plaintiff, the "Spring Valley Water Works," under the law and corporation Acts aforesaid, free of charge, being water in case of great necessity other than fire, and making of said demand more than $300 during each and every month of the forty-six months charged for, the same amounting in the aggregate to not less than $13,800.

Respondents aver that another item in said demand was for water supplied to the City Hall, the Hall of Records, the Corporation Yard, Courts, and other municipal and city and county offices, for the use of the municipal officers, Judges, employes of said city and county, and persons having business thereat, and was greatly and indispensably necessary to them, their health.

comfort and well being, and to said city and county in the maintenance of said establishments That said water was due to said city and county from the plaintiff under said corporation Acts, free of charge, being water in case of great necessity other than fire, and making of said $92,000 demand more than $300 for and during each and every month charged for, the same amounting in the aggregate to not less than $13,800.

And respondents allege that another of the items of said demand, and which, taken with the foregoing, constitutes the whole, was for water furnished for Portsmouth Square and other squares and public places belonging to said city and county, exclusive and irrespective of Golden Gate Park, which forms no part of said demand, and used in the necessary irrigation of the trees, shrubs and grass, without which the same would have withered and perished. That said water so used was greatly and indispensably necessary to said city and county, in the maintenance of said squares and public places, to prevent the loss of said trees, shrubs and grass by drought. That said water was due to the city and county from the plaintiff under said Corporation Acts, free of charge, being water furnished in case of great necessity other than fire, making of said demand more than Five Hundred Dollars each month, amounting in the aggregate to not less than $23,000.

Respondents aver and charge that the foregoing classification of the purposes for which said water was used by said city and county from the

1st day of February, 1869, to the 30th day of November, 1872, with the respective character and object of each item of water, and the proportion and prices charged against the various municipal institutions and departments of said city and county by said Water Company, is a true and correct classification and exhibit thereof, taken from the bills rendered by said Water Company, and set forth in the answer of the said Monroe Ashbury, Auditor of said city and county, to said petition for a writ of mandate, and stands confessed in said case by the demurrer thereto of said Water Company.

And respondents allege that said case has been appealed to this Court from the judgment of said 15th District Court, and is now among the records of this Court on said appeal; and respondents aver that said demand for $92,000 is one of the demands, and comprises the whole of the water used by said city and county, from the pipes and mains of said water company, within the period named therein, to ~~wit~~ wit: from February 1, 1869, to November 30, 1872, for the non-payment of which the said Spring Valley Water Works complains in its said petition, and for which it threatened to cut off, and did cut off the water from the various municipal institutions, buildings and departments of said city and county, aud to prevent which the said resolutions and order were passed, regulating the delivery of water for municipal purposes as aforesaid.

Respondents aver that the second suit referred to above is an action of assumpsit commenced

and now pending in said Fifteenth District Court, directly against said city and county to recover the sum of $169,015 for water furnished said city and county by said Water Works since March 1, 1873 and taken together with said $92,000 claim, comprises the whole of the water taken from the pipes and mains of said Water Company by said city and county, for any municipal purpose whatever, except for the extinguishment of fire during the pendency of the same; and for the non-payment of which said Water Company threatens to cut off said connection of said city and county therewith.

And respondents aver that said claim, like the said $92,000 claim, is for water furnished for every municipal purpose, except the extinguishment of fire *during the actual pendency thereof*, and that the items are the same as those named above as constituting the $92,000, except that this $169,015 is in part for water furnished for flushing and cleaning the sewers of said city and county when the same was done under orders from the Board of Health, when the city was in a state of epidemic.

And respondents further aver that all of said water was and is due to said city and county as water furnished and used IN CASE OF FIRE OR OTHER GREAT NECESSITY, AND FREE OF CHARGE.

And respondedts aver, that if there is any feeling on the part of the people of San Francisco against any of the local Courts of said city and county, as is alleged by petitioners, it has grown up from a belief on the part of the people

that the decision of this Court in the case of The City and County of San Francisco *versus* The Spring Valley Water Works, No. 4660 and reported in the 48th volume of California Reports, to the effect that the city is entitled to water in case of fire or other great necessity, free of charge, was disregarded by said Court in the first of the two mentioned cases, and that there is danger that the same illegal ruling will be rendered in the last thereof, and that it is not the fault of the people of said city and county or their counsel.

Respondents aver that the officers and directors of the Spring Valley Water Works, and who demand payment for water from said city and county, and all of them, are other and different persons from the officers and directors of said Water Company from the year 1858 to the year 1868-9, and that very few, if any, of the original stockholders are now the owners of the stock of said company, and further, that the management and ownership of said corporation and its franchises and privileges have changed hands, and had changed hands before said year 1868–9, and the original ~~partners~~ parties in interest had severed their connection with the same before said demand for payment for water for unnecessary purposes was made.

and now pending in said Fifteenth District Court, directly against said city and county to recover the sum of $169,015.55 for water furnished said city and county by said Water Works since March 1, 1873 and taken together with said $92,000 claim, comprises the whole of the water taken from the pipes and mains of said Water Company by said city and county, for any municipal purpose whatever, except for the extinguishment of fire during the pendency of the same; and for the non-payment of which said Water Company threatens to cut off said connection of said city and county therewith.

And respondents aver that said claim, like the said $92,000 claim, is for water furnished for every municipal purpose, except the extinguishment of fire *during the actual pendency thereof*, and that the items are the same as those named above as constituting the $92,000, except that this $169,015.55 is in part for water furnished for flushing and cleaning the sewers of said city and county when the same was done under orders from the Board of Health, when the city was in a state of epidemic.

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Respondents aver that the officers and directors of the Spring Valley Water Works, and who demand payment for water from said city and county, and all of them, are other and different persons from the officers and directors of said Water Company from the year 1858 to the year 1868-9, and that very few, if any, of the original stockholders are now the owners of the stock of said company, and further, that the management and ownership of said corporation and its franchises and privileges have changed hands, and had changed hands before said year 1868–9, and the original ~~partners~~ parties in interest had severed their connection with the same before said demand for payment for water for unnecessary purposes was made.

Special Defense.

Respondents further aver, by way of special defense, that said water company ought not to have the right to interfere with or prevent said city and county from taking water for municipal purposes from said company's pipes until a price or rate has been fixed for the same by law, which said city has always been willing and desirous to have done, and is still willing and desirous to have done.

Respondents further aver that neither said San Francisco City Water Works or said Spring Valley Water Works have ever appointed any Commissioners under Section 4 of the Act of April 22, 1858, or under Section 549 of the Civil Code, or in any manner whatsoever, or taken any steps toward fixing or establishing any lawfal rate or price for water, either to the City and County of San Francisco or the inhabitants thereof, nor has any rate ever been fixed under said laws; but that, on the contrary, from the organization of said companies in 1858 until this time said San Francisco City Water Works, while in operation, and said Spring Valley Water Works has always levied and now is levying upon and collecting from such of the inhabitants of said city and county as did take and use, or who now take and use, said water, for any purpose whatsoever, some arbitrary and unequal rates fixed by the officers of said water company alone, in which said inhabitants are not charged alike and without distinction of person, as by law should be done.

And respondents aver that the only rate that has ever been fixed or established for water in said city and county, for any purpose whatsoever, was fixed by the Commissioners appointed under the Act of the Legislature entitled "An Act to establish water rates in the City and County of San Francisco," approved March 1, 1876, and the amendments thereto; and which rate so established only applies to water furnished to the inhabitants of said city and county for domestic and business purposes, and does not fix or establish any rate or price for water furnished to said city aud county for any municipal purposes whatsoever, nor has any ever been established for such purpose.

And respondents aver that said water company has refused, and still refuses, to be bound by said rate or tariff of prices, bnt still persists in collecting from said inhabitants pay for water under the arbitrary and unlawful rate fixed by its own officers.

And respondents aver that the price demanded by said water company for the water furnished by it to said city and county in the past, for municipal purposes, and which it demands for said water in the future, and for the non-payment of which it cut off, and has threatened and still threatens to cut off, said water from said city and county, and its said demands hereinbefore set forth for $92,000 and $169,015 55/100 were not, and are not, based upon or in accordance with any rate fixed or established, either by Commissioners appointed under and in accordance with the provisions of

any of the charters of said water company, or of either of them, or of the General Law of April 22, 1858, or of Sec. 549 of the Civil Code, or of the "Act to establish water rates in the City and County of San Francisco," passed March 1, 1876, or of any law whatever, but is based upon some arbitrary and unjust rate, fixed by said Spring Valley Water Company, in defiance of law, and greatly in excess of the lawful rate or value of said water.

And respondents aver that before said water company can collect, or be entitled to compensation for water for said city and county, for municipal purposes, some rate must be established therefor by law, so that the operations of said city government shall not be at the mercy of said water company, or of any water company.

Special and Additional Defense.

And for a further and separate answer and defense to said petitioner, respondents aver that on the 15th day of June, A. D. 1857, a corporation was duly created under and by virtue of an Act of the Legislature of the State of California, entitled, "An Act to provide for the formation of corporations for certain purposes," passed April 14, 1853, amended by an Act approved April 30, 1855, and the name of said corporation was, "The San Francisco City Water Works;" its principal place of business was the City and County of San Francisco, and the object of its

said incorporation was to introduce pure fresh water into the City and County of San Francisco, for the purpose of supplying the inhabitants thereof and the public buildings therein with the same, and to do and transact all such other business relating thereto as may be necessary and proper, and its capital stock was one million five hundred thousand dollars.

And respondents aver that said corporation, being so organized, at once entered upon its said business, and regularly carried the same on until the 13th day of February, 1865, when it, by deed and sufficient conveyance in writing, authorized by its Board, sealed with its corporate seal, and delivered, conveyed all its property, rights, franchises and privileges to the Spring Valley Water Works, the petitioner herein, which duly accepted of the same, and has continued ever since to conduct the said business, and to hold and use, exercise and enjoy said property, contracts, privileges and franchises so conveyed to it by said San Francisco City Water Works.

And respondents aver and show that the time of, and long before the organization of said San Francisco City Water Works, to-wit: on the 3d day of August, 1857, the City and County of San Francisco was the owner, and as such was possessed of certain lands and water in the Western Addition, a portion of said city and county, known as Mountain Lake and Lobos Creeks, and the lands under and adjacent to and surrounding the same.

And respondents aver that said city and county,

being so possessed and the owner of said lands and waters, on the said 6th day of August, 1857, by its regularly constituted authorities, to-wit, its Mayor and Board of Supervisors, passed a certain ordinance, known as Order No. 46, which Order was duly approved by E. W. Burr, the President of said Board, and was afterwards duly ratified, approved and confirmed by the Legislature of the State of California on the 18th day of March, 1858, by an Act entitled "An Act to ratify and approve Order No. 46, of the Board of Supervisors of the City and County of San Francisco, approved August 6th, 1857;" which said Act and Order, so ratified and confirmed, are printed in full in the Session Laws of this State for the year 1858, commencing at page 75; and respondents make, by reference, part of this answer, praying this Court to consider the same as if herein fully set forth.

And respondents aver that afterwards, to-wit: on the 29th day of August, 1858, said Board of Supervisors of the City and County of San Francisco passed an Order known as Order No. 172, amendatory of Order No. 46 and repealing Order No. 65 and Order No. 92, which Order was duly approved by E. W. Burr, President of said Board, on the 3d day of August, 1859.

And respondents aver that said Order No. 172 was duly ratified, approved and confirmed by the Legislature of the State on the 12th day of April, 1860, by an Act entitled "An Act to ratify and confirm Order No. 172 of the Board of Supervisors of the City and County of San Fran-

cisco," which Act and the ordinance so confirmed are printed in full in the Session Laws of the State of California for the year 1860, commencing at page 169, which Act and ordinance respondents make a part hereof by reference, asking the Court to consider the same as if set out herein at length.

And respondents aver that said orders and acts constituted and were a contract with and employment of said San Francisco City Water Works by said City and County of San Francisco, to bring said water of Lobos Creek, which then and there belonged to said city and county, through the lands and streets of said city and county, into said city and county, for protection against fire and for other public uses authorized by law. And respondents aver that one of the moving considerations of said contract coming to said city and county from said Water Company was a provision set forth in Section 4 of said Order No. 46, which provided that said city and county should be and was entitled to "the free use of water so introduced for the purpose of extinguishing fires and for the supply of all hydrants, fire plugs, pumps and cisterns, and for all the public purposes of said city and county, except the sprinkling of streets."

And respondents aver that said San Francisco City Water Works then and there accepted said contract, and entered upon the performance of the same, and did bring said water of said Lobos Creek belonging to said city and county into said city and county, and through the lands and

streets of said city and county, for the purposes aforesaid, and continued to supply the inhabitants of said city and county with water for domestic uses ~~at fixed rates of compensation~~, and said city and county with water for the extinguishment of fires, and all municipal purposes, except the sprinkling of streets, and did erect a marble fountain in Portsmouth Square and supply the same with water, and performed all and singular the obligations and conditions of said contract with said city and county up to and until the said 13th day of February, 1865, when it sold, assigned and transferred its property, rights and franchises, as hereinbefore specified, to the Spring Valley Water Works.

And respondents aver that said Spring Valley Water Works, upon taking and accepting said transfer, assignment and purchase of said San Francisco City Water Works, as it did on said last-named day, and from that time, entered upon said land and water of the city and county, and used and appropriated the same to the same uses as was done before that time by its said predecessor, and that it accepted said contract and duly performed its conditions by furnishing said water to said city and county, free, for the extinguishment of fires and for all municipal purposes except the sprinkling of streets, for more than four years thereafter, without objection or demand of compensation and has in fact furnished the same ever since, and is now furnishing the same.

And respondents aver that the water that is referred to in the petition of said Spring Valley

Water Works, filed herein, and which it claims payment for, and which it has threatened to cut off for non-payment, and concerning which said ordinances and resolutions were passed, is the same identical water, and furnished and used for the same uses and municipal purposes, that are provided for in said contracts, to wit: Order No. 46 and Order No. 172—as due to said city and county free of charge.

And respondents aver that said contract has never been released, modified or changed by any competent authority, but still remains in full force and effect; and that said Spring Valley Water Works is now, and has been ever since its said purchase, in the full and complete enjoyment and possession of said land and water of said city and county, and of its privileges under said contract.

Wherefore, the respondents pray that said Spring Valley Water Works, the petitioner herein, may be adjudged to take nothing by its said application, but that this Court will consider of this case, and will determine and adjudge that the said Spring Valley Water Works is bound, by the law and its charter of incorporation, to furnish and supply to said City and County of San Francisco, and that said city and county is entitled to take, have and use, of and from the pipes, reservoirs and mains of said company, at all times, a full and sufficient supply of pure fresh water, to the extent of said Water Company's means, in case of fire or other great necessity, free of charge.

And respondents further pray the Court to resolve, decree, and determine, that the water due from said Water Company to said city and county, in case of fire or other great necessity, free of charge, comprises the following purposes, and the same are, and each, all and every of them is, a case of fire or other great necessity, to wit:

A sufficient supply of water for the extinguishment of fires, and also for the efficient, complete and perfect service and operation of the Fire Department of said city and county, in all its functions, its engine, hose and hook and ladder houses; also for the officers, men and horses, and to fill and keep filled the boilers of the engines to generate steam, and all other necessary purposes, as well as the corporation yard and all necessary appendages to said Fire Department.

Also, for the use of the Hospitals and establishments for the sick and infirm.

Also, for the Alms-houses and Houses of Refuge, Home for the Inebriate, and all public asylums and poor-houses.

Also, for the prisons, industrial schools, workhouses, reformatories, and all houses and places of detention and correction of criminals and persons detained under charge of crime.

Also, for the public or common schools of said city and county, and all institutions of learning belonging to and supported by said city and county.

Also, for all public buildings, city halls, courts, police stations, and offices necessary for the accommodation of the officers and business of said city and county.

Also, for the irrigation, when necessary, of the parks, plazas, squares, gardens and grounds of said city and county. Also, for flushing and cleaning the public streets, sewers, culverts, drains, and manholes of said city and county. And for any other case of great and indispensable necessity to a well regulated city in an enlightened country, and inhabited by a refined and highly civilized people, and that these respondents may be hence dismissed with judgment for their costs in this proceeding expended.

Wellington W. C. BURNETT,

City and County Attorney of the City and County of San Francisco, and the Attorney for Defts

JOHN F. SWIFT,

Special Counsel of the City and County of San Francisco.

State of California, }
City and County of San Francisco. } ss.

Andrew J. Bryant, being first duly sworn, says that he is Mayor of the City and County of San Francisco, and makes this affidavit on the part and behalf of said city and county; that he has read the foregoing answer of said city and county, and knows the contents thereof; that the same is true of his own knowledge except as to such matters as are

therein stated upon information and belief, and that as to such matters he believes the same to be true.

Subscribed and sworn to before me, this 13th day of April, A. D. 1877. } A. J. Bryant

J. D. Ruggles Deputy County Clerk

EXHIBIT NO. 1.

Complaint In Case No. 4660, Fifteenth District Court.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO, vs. THE SPRING VALLEY WATER WORKS.	No. 4660.

The City and County of San Francisco, a body politic and corporate, in name and in fact, under and by virtue of an Act of the Legislature of the State of California, entitled "An Act to repeal the several charters of the City of San Francisco, to establish the boundaries of the City and County of San Francisco, and to consolidate the government thereof," approved April 19th, 1856, by this, its second amended and supplemental complaint, complains of the defendant, and for cause of complaint alleges:

That the defendant, the Spring Valley Water Works, is a corporation, duly organized, and acting under and by virtue of an Act of the Legisla-

ture of the State of California, entitled "An Act for the incorporation of Water Companies," approved April 22d, 1858, (Stat. 1858, p. 218), and the said corporation, last aforesaid, has become and is the owner of all the franchise granted one George H. Ensign and others, under and by virtue of an Act of the Legislature of the State of California, entitled "An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water pipes in the public streets of the City and County of San Francisco," approved April 23d, 1858, and by virtue of an Act amendatory thereof, approved April 11th, 1859, which said Acts are respectively hereto attached, marked Exhibit "A" and Exhibit "B," and made a part of this complaint.

That on the 15th day of June, A. D. 1857, a corporation was created, under and by virtue of an Act of the Legislature of the State of California, entitled "An Act to provide for the formation of corporations for certain purposes," passed April 14th, 1853, amended by an Act approved April 30th, 1855, and the name thereof was the San Francisco City Water Works.

That heretofore, to-wit; between the said 15th day of June, A. D. 1857, and the 1st day of September, A. D. 1858, the said corporation, known as the San Francisco City Water Works, was, by the Statutes of this State and the Orders and Ordinances of the Board of Supervisors of the City and County of San Francisco, in that behalf, duly passed and approved, authorized and required to introduce into the said City and County pure fresh

water for fire, municipal and other purposes, which authority last aforesaid, and the rights thereunder, was accepted by the corporation last aforesaid. That while the authority last aforesaid continued, to-wit: on the 16th day of September, A. D. 1858, the corporation last aforesaid did introduce into said City and County pure fresh water for fire, municipal, and all other purposes, and continued from that time to introduce water as last aforesaid into said City and County, until the time of the conveyance by the corporation last aforesaid unto the defendant herein as hereinafter stated, and during all of that time had authority to introduce water as last aforesaid.

That the said corporation, known as the San Francisco City Water Works, was by the said plaintiff, after the said 16th day of September, A. D. 1858, granted various rights and privileges, and the same were granted under and in pursuance of the provisions of Section 1 of an ordinance of the City and County of San Francisco, which was passed on the 29th day of August, 1859, entitled "Order No. 172, amendatory of Order No. 46, and repealing Order No. 65 and Order No. 92, in relation to the San Francisco City Water Works," which said Order was ratified and confirmed by an Act of the Legislature of the State of California, entitled "An act to ratify and confirm Order No. 172 of the Board of Supervisors of the City and County of San Francisco," approved April 12th, 1860, which said Section 1 of said Ordinance so ratified is hereunto attached, marked Exhibit "C," and made part of this complaint.

That under and in pursuance of said Section, the

rights and privileges granted to the said San Francisco City Water Works were accepted and used by the said corporation, and said corporation did introduce pure fresh water into the City and County of San Francisco, through lands claimed as belonging to the City and County of San Francisco (this plaintiff) in pursuance of said Section.

That under and in pursuance of Section 4 of an Ordinance of the City and County of San Francisco, which was passed on the 3d day of August, A. D. 1857, entitled "Order No. 46, in relation to the introduction of pure fresh water into the City and County of San Francisco, for fire, municipal and other purposes," a copy of which said Section 4 of said Ordinance is hereunto attached, marked Exhibit "D," and made a part of this complaint, it was the duty of said corporation to furnish and supply this plaintiff with water, free of charge or compensation, for fire and for all the public purposes of said City and County (this plaintiff), except for the purpose of sprinkling streets, and it was the right of the plaintiff, under the direction of its Board of Supervisors, to tap the pipes and connect the same with the hydrants, fire-plugs, pumps, cisterns, and other public works, at such places as said Board might deem proper.

That said Section 1 of Order No. 172, and Section 4 of Order No. 46, of the Board of Supervisors of the City and County of San Francisco, hereinbefore recited, ever have been, and now are, in full force and effect, and not in any wise modified or repealed.

That on the 13th day of February, A. D. 1865,

the said corporation, called the Spring Valley Water Works, defendant herein, was existing, and has ever since continued to exist, and both prior and subsequently to said last named day, the said defendant was engaged and is yet engaged in the business of introducing into said City and County of San Francisco pure, fresh water; and that on said 13th day of February, A. D. 1865, the said corporation, called the San Francisco City Water Works, by indenture of that date, duly executed, stamped, and delivered to and accepted by the said defendant, did convey, set over and transfer to the said defendant all and singular its property, real, personal, and mixed, and all its franchises, rights, and privileges theretofore owned or held by it, including the said right to introduce into the said City and County of San Francisco pure, fresh water, under the said several orders aforesaid, and from thence, hitherto, the said defendant has held, and still holds and exercises, all and singular, the said rights and privileges, and has been thence, hitherto, and is now yet engaged in the exercise and enjoyment of the said franchises and privileges, under and in pursuance of all and singular the terms and conditions and obligations of the said acts of the Legislature of the State of California and Orders and Ordinances of the Board of Supervisors of the City and County of San Francisco, respectively named, and not otherwise, and that from and since the time of said conveyance and transfer, the said San Francisco City Water Works Company ceased to exercise any of said franchises, and the said defendant is and since then

has been the only corporation or person engaged in introducing pure, fresh water into said City and County of San Francisco.

That in the said month of February, 1865, and subsequently to said 13th day of February, 1865, and while the said several laws and ordinances were in force, the said defendant, the Spring Valley Water Works, did furnish and supply to the plaintiff nine hundred and sixty-nine thousand nine hundred and seventy-four gallons of water for municipal purposes, other than the extinguishment of fires, to-wit: For the purpose of irrigating and watering a certain square in said city, called Portsmouth Square, and said water was used by the said plaintiff for the purpose of such irrigation, and not for any other purpose; and the value of such water was then and there the sum of seven hundred and twenty-seven dollars and forty-eight cents in United States gold coin.

That thereupon the said defendant made claim against the plaintiff for said last mentioned sum of money, as the value of the said water so furnished to and used by the plaintiff as aforesaid, and thereafter, to-wit: on the 4th day of May, 1867, in this Honorable Court, the said defendant, as plaintiff, impleaded the plaintiff, as defendant in an action at law, of and concerning and for the recovery of said claim, for compensation for said water so furnished and used as aforesaid, about the irrigation of said Portsmouth Square; and said plaintiff, as such defendant in said action, appeared therein, and filed an answer and defense thereto, and, among other things, pleaded as a

defense to said action in substance, that said defendant here, (plaintiff in said action) was, by force and effect of said ordinances and laws, bound to furnish the said water in the said action mentioned free of charge or expense to the plaintiff, and without any charge or remuneration therefor from the plaintiff. And the plaintiff avers that in the said action there was, in the pleading therein and upon trial thereof, distinctly brought in issue and in question the right of the said defendant here (plaintiff in said action) to demand and receive from this plaintiff compensation for water furnished by said defendant to the plaintiff, under said laws and ordinances aforesaid, and that thereupon in said action it was adjudged and determined by this Honorable Court, in substance and to the effect that the said defendant was bound and compelled by the force and effect of the said laws and ordinances, to furnish the plaintiff, free of charge, not only all water necessary for the extinguishment of any fire, but necessary for all other municipal purposes within the limits of said city, and thereupon judgment in favor of the said plaintiff here (defendant in said action) was duly entered; all of which several matters and things will fully appear by reference to the pleadings, proceedings, and judgment in said action, as the same remains upon the records of this Honorable Court, and whereto the plaintiff prays leave to refer upon the hearing in like manner, as if a copy thereof was hereto annexed and made part of this complaint. And the plaintiff avers, that upon the trial of said action, the fact that the

said water had been furnished by the defendant here, for the plaintiff, and had been used by the plaintiff here, for the purpose of irrigating said Portsmouth Square, and not for the extinguishment of any fire, was distinctly proven, and the only question determined by said decree and judgment was the question as to the duty of the said defendant here (plaintiff in said action) to furnish the plaintiff water for all municipal purposes in said City and County of San Francisco, and that in said action this Honorable Court did determine that it was the duty of the defendant here to furnish to this plaintiff all such water, without charge or compensation therefor. And the plaintiff avers, that the said judgment and decision so entered and given as aforesaid, by this Honorable Court, has never been reversed, modified, or set aside in any manner, but the same is yet in full force.

The plaintiff is advised, and believes, and charges the same to be true, that under and by force and virtue of the said several Acts of the Legislature of the State of California, and Orders and Ordinances of the Board of Supervisors aforesaid, and upon the facts and premises in this complaint hereinbefore set forth, it has become, and is, the duty of the defendant to furnish, and, ever since the 13th day of February, A. D. 1865, the said defendant has furnished to the plaintiff all necessary water for the extinguishment of any fire, and for all other municipal purposes within the limits of the said City and County of San Francisco, to the full capacity of the works held and controlled by the said defendant, free of charge to the plaintiff, and

that the Chief Engineer of the said City and County of San Francisco (this plaintiff) has, under the direction of the Board of Supervisors, the right to tap any pipes of the defendant laid down in said City and County, for the purpose of conducting water, and to connect hydrants therewith, and receive water therefrom for all said purposes, free of charge.

The plaintiff is further advised and believes, and charges the same to be true, that there are no other means existing in the said City and County of San Francisco, from which it could be supplied with pure fresh water for the extinguishment of fire, or for any other municipal uses, except the water pipes of said defendant, and that the means whereby said water can be supplied is solely in the power and under the control of the said defendant, and its agents and servants, but which should of right be subject to the control of plaintiff, and its proper officers, to the extent only of obtaining therefrom water for the municipal purposes aforesaid, free of charge.

That the use of said water for said purposes is indispensable to the plaintiff and to the good order, government, health and general security of the said City and County of San Francisco, and that the withholding or cutting off the supply thereof from the plaintiff would be productive of great and irreparable damage and loss to the plaintiff, and would expose the said City and County of San Francisco to great damage and destruction by fire, and would injuriously affect the cleanliness of the said city and county and the health of the inhabi-

tants thereof, and would greatly injure and obstruct the Alms House, the Hospitals, Industrial School, and other public institutions of the said City and County of San Francisco.

That the defendant, by its President and other officers and managing agents, threaten that it and they will, and the plaintiff avers that, unless restrained by an order from this Honorable Court, it and they will cut off and deprive the plaintiff from the use of any water flowing in the pipes of the defendant, within the limits of the said city and county, for any municipal uses or purposes, other than the extinguishment of fire during the actual pendency of the same, within the limits of the City and County of San Francisco, and will thereby prevent the plaintiff, to that extent, from the use and enjoyment of the rights and privileges of taking water from the said defendant to the extent to which said plaintiff is justly entitled.

Wherefore, the plaintiff prays this Honorable Court, that the said defendant, its President, managing agents, or employees may be forever restrained and enjoined from cutting off from this plaintiff the supply of water flowing in the pipes of defendant, and used by plaintiff for municipal purposes and uses, and that plaintiff have such other and further relief as may be just and equitable.

W. C. BURNETT,
Attorney for Plaintiff.

State of California, }
City and County of San Francisco. } ss.

Thomas H. Selby, being duly sworn, deposes and says, that he is Mayor an *ex-officio* President of of the Board of Supervisors of the City and County San Francisco; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that, as to those matters, he believes it to be true.

THOMAS H. SELBY,

Mayor of the City and County of San Francisco.

Subscribed and sworn before me, this 14th day of October, 1870.

JOHN HANNA, County Clerk.

EXHIBIT "A."

Spring Valley Water Works Franchise.

An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water pipes in the public streets of the City and County of San Francisco. (Approved April 23, 1858.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The said George H. Ensign and his associates and their assigns shall have the right, and the same is hereby granted to them and their

assigns, to lay down distributing iron water pipes in any of the public streets, ways or alleys of the City and County of San Francisco; *provided,* said pipes shall be so laid down as not to interfere with or obstruct any gas or water pipes of any other parties, laid down by authority of law, for the purpose of introducing and furnishing fresh water for the supply of the inhabitants of said City and County of San Francisco; *provided,* that to the extent of three thousand running feet of said pipes be laid down within one year from and after the passage of this Act, and water furnished therefrom to such citizens along the line, street or streets, where said iron pipes shall be laid down as may elect to take the same, and the balance of said iron pipes to be laid down as soon thereafter as practicable.

SECTION 2. Said streets or ways in which said iron pipes may be laid, to be placed in the same good order and condition, by said Ensign and his associates or assigns, as the same were before said pipes were laid down, at his or their cost and charge, and under the supervision of the Superintendent of Streets and Highways, and to his satisfaction.

SECTION 3. The Chief Engineer of the Fire Department, under the direction of the Board of Supervisors of said City and County of San Francisco, shall have the right to tap any pipes so laid down, and connect hydrants therewith, for the extinguishment of any fire or fires during the pendency of the same, free of charge, to the full capacity of the said water works, up to and until

such time as water shall be introduced into said city and county by some other person or persons; thereafter said Ensign and his associates or their assigns shall furnish for fire and other municipal uses their quota or proportion of whatever water may be produced by them, or may be introduced by any other person or persons.

SECTION 4. The rate or price to be charged for water, with the exception mentioned in Section 3 of this Act, shall be fixed by five Commissioners, two of whom shall be appointed by the Board of Supervisors, and two by the parties named in Section 1 of this Act, and they shall choose a fifth, and the rates agreed upon and fixed by a majority of said Commissioners shall be the rates charged and received; *provided*, that the rates so established shall not be so low as to yield less than twenty per cent. per annum on the actual capital invested in said works. And whenever the said City and County of San Francisco shall become the owner of any other works for the supply of the said city with fresh water, from any source west or south of the charter line of 1851, then the said city and county may also purchase all the works, appurtenances and franchises belonging to said grantees herein, or their assigns, as provided in Section 5, and if the said city and county shall not elect to purchase, as provided in this section, then the Board of Supervisors, if not otherwise provided for by law, may fix the rates for water, but shall not fix the rates for water supplied by the grantees herein below the rates charged by the city and county for water delivered from the works of said city and county.

SECTION 5. The city and county shall have the right at the expiration of twenty years from the passage of this Act, on giving six month's notice of their intention so to do, to purchase all the works and franchise hereby granted belonging to said Ensign, his associates or assigns, which may be in use for the purpose of supplying water to the people of said city, at their true value, to be determined by a Board of Commissioners, to consist of four persons, who shall be civil engineers, two to be designated by the then corporate authorities of said city and county, and two by owners of said Water Works and property; and in the event of their disagreement, the said Commissioners shall have the right to select a fifth Commissioner, and the decision of a majority of said Board shall be final.

SECTION 6. That privileges herein granted to said parties, named in Section 1 of this Act, shall be limited to a period of thirty years.

SECTION 7. Nothing in this Act shall be construed so as to interfere with any existing rights of either the Mountain Lake or San Francisco City Water Works Companies.

SECTION 8. This Act shall not take effect unless the parties named in Section 1 shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations, now in force in this State.

SECTION 9. All laws and parts of laws inconsistent with any of the provisions of this Act, are hereby declared to be inoperative, so far as provision is otherwise made by this Act.

EXHIBIT "B."

Amendment.

An Act to amend an Act entitled "An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water pipes in the public streets of the City and County of San Francisco," passed April 23, 1858, approved April 11, 1859.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section 1 of said Act is hereby amended so as to read as follows:

SECTION 1. The said George H. Ensign and his associates and their assigns shall have the right, and the same is hereby granted to them and their assigns to lay down distributing iron water pipes in any of the puclic streets, ways or alleys of the City and County of San Francisco; provided, said pipes shall be so laid as not to interfere with or obstruct any gas or water pipes of any other parties, laid down by authority of law, for the purpose of introducing and furnishing fresh water for the supply of the inhabitants of said City and County of San Francisco; provided, that to the extent of three thousand running feet of said pipes be laid down within two years from and after the passage of this act, and water furnished therefrom to such citizens along the line, street or streets where said iron pipes shall be laid down, as may elect to take the same; and the balance of said iron pipes be laid down as soon thereafter as practicable.

SEC. 2. Nothing herein contained, or contained in the Act passed April 23, 1858, shall in any manner inure to or be so construed as to affect any rights or privileges heretofore granted to either the Mountain Lake Water Company or the San Francisco City Water Works Company.

EXHIBIT "C."

Order No. 172. Amendatory to Order No. 46, and Repealing Order No. 65 and Order No. 92, in Relation to the San Francisco City Water Works.

The People of the City and County of San Francisco do ordain as follows:

SECTION 1. Section 1 of Order No. 46 is hereby amended, so as to read as follows:

SECTION 1. The San Francisco City Water Works, a Company duly incorporated according to the laws of this State, and their successors and assigns, shall be allowed to introduce pure fresh water for fire, municipal and other purposes into the City and County of San Francisco, through any lands claimed as belonging to the City and County of San Francisco, and to conduct water from a dam to be constructed near the mouth of "Lobos Creek," so called, by means of a suitable aqueduct of sufficient capacity to carry all the water of said stream, commencing at a point near the mouth of said creek, thence following along the shore of the Bay, to some suitable point at North

Beach, near the foot of Van Ness Avenue, at or near which point the said Company shall build a reservoir of not less than fifty thousand gallons capacity, and the said work shall be forfeited to the City and County of San Francisco, if not completed as specified in this Section, on or before the 1st day of January, 1860, unless the progress of the work be suspended by law, in which case an additional time shall be allowed to the Company equal to the period during which the progress of the work may have been suspended, as aforesaid; provided, said Company shall use all due diligence in relieving themselves from all such legal impediments.

EXHIBIT "D."

Section 4 of Order No. 46.

The said city and county, under the direction of the Board of Supervisors, shall be entitled to the free use of the water so introduced for the purpose of extinguishing fires, and for the supply of all hydrants, fire-plugs, pumps, and cisterns, and for all the public purposes of said city and county, except for sprinkling the streets, and the city and county shall have the right, under the direction of the Board of Supervisors, to tap the pipes and connect the same with hydrants, fire-plugs, cisterns, and other public works, at such places as they may deem proper.

Filed October 17, 1871.

JOHN HANNA, Clerk.
A. S. ELDRIDGE, Deputy Clerk.

Due service by copy of the within original is hereby admitted to have been made this 17th day of October, 1871.

CHAS. N. FOX, Att'y for Defendant.

EXHIBIT No. 2.

Answer of Spring Valley Water Works in Case 4660.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO,
vs.
THE SPRING VALLEY WATER WORKS.
} No. 4660.

The Spring Valley Water Works, defendants, answering unto the amended complaint filed in this cause:

Deny and aver that it is not true that section 4 of Order No. 46 of the Board of Supervisors of the City and County of San Francisco, referred to in said complaint, and a copy of which is annexed thereto, marked "EXHIBIT D," ever has been and now is in full force and effect, and not in anywise modified or repealed.

On the contrary thereof, these defendants aver that section 8 of said Order number 46 has never been in any manner modified or repealed; that said section 8 is in the words and figures following, to wit:

"SECTION 8. It is hereby provided that should "any other company, person or persons receive "permission to introduce water for the purpose of

"supplying the city and county therewith, on "more favorable terms shall be granted to such "company or persons than to the company author- "ized under this Order, without extending the "same terms to the San Francisco Water Works."

And these defendants are informed, advised and believe, and upon and according to the said information, advise and belief, aver and charge the truth to be that, by reason of the force and effect of said section number eight of said Order No. 46 and the passage of said Act of the Legislature, entitled "An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water-pipes in the City and County of San Francisco.

Approved April 23d, 1858, and the Act amendatory thereof, copies of which Acts are annexed to said complaint, marked Exhibits A and B.

Said section number 4 of said Order number 46, was so far modified that the said San Francisco City Water Works, their successors or assigns, have not been since the passage of said Act of April 23d, 1858, under any obligations to furnish said city and county with water free of charge for any purpose whatever, except for the extinguishment of fires during the pendency of the same; and the said city and county has not been entitled, since the passage of said last-named Act, to the free use of water from the works of said San Francisco City Water Works, their successors or assigns, or from the works of these defendants, for any purpose whatever, except for the extinguishment of fires during the pendency of the same, as aforesaid.

And these defendants, in this connection, further aver and show, that the provisions of said section No. 4, of said Order No. 46, and all the provisions of said Order No. 46, and also of said Order No. 172, referred to in said complaint, were so far limited, altered and modified by an Act of the Legislature of this State, passed at the request and in pursuance of a resolution of the Board of Supervisors of said city and county, entitled "An Act to extend the rights and privileges of the San Francisco City Water Works," approved April 8th, 1863, a copy of which is hereto annexed, marked "EXHIBIT A," and made a part of this answer, that the said San Francisco City Water Works, their successors and assigns, have been under no obligation to said city and county whatever, other than those imposed upon these defendants by the said Act to authorize George H. Ensign and others owners of the Spring Valley Water Works to lay down water-pipes in the City and County of San Francisco; and these defendants aver, that, since the passage of said Act of April 8th, 1863, the said city and county has not been entitled to the use of water free of charge, or to the free use of water from the works of said San Francisco City Water Works, their successors, or assigns, or from the works of these defendants for any purpose whatever, except for the extinguishment of fires during the pendency of the same.

These defendants admit that, on the 13th day of February, 1865, the said San Francisco City Water Works conveyed to these defendants all the rights which they then had, to introduce pure

fresh water into said City and County of San Francisco; but defendants deny that the rights so held, and then transferred by said San Francisco City Water Works, were then, or at any time since, been held either by the said last-named Company, or by these defendants, under the said Orders of said Board of Supervisors, as the same are recited in said complaint; and aver that the same were, and are so held under said Orders, as the same were and are modified by Act of the Legislature, in manner and form in this answer hereinbefore set forth, and not otherwise.

And these defendants deny that they have, since the day last aforesaid, or do now, exercise and enjoy any or all of the rights, privileges, and franchises aforesaid, subject to the terms, conditions, or obligations mentioned in said Orders of said Board of Supervisors, as the same are set forth in said complaint. On the contrary, these defendants aver that they have so held, and do now so hold, exercise, and enjoy said rights, privileges, and franchises, subject only to the terms, conditions, and obligations mentioned in said Act, to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water-pipes in the public streets of the City and County of San Francisco, and under the said Orders, as the same are modified to correspond with said last-named Act, by the provisions of said Act to extend the rights and privileges of the San Francisco City Water Works.

And these defendants are informed and believe that it is not true, and upon and according to their

information and belief, they deny that upon the trial of the action referred to in said complaint, brought and tried in this Court, wherein these defendants were plaintiffs, and the plaintiff herein was defendant, there was distinctly or at all brought in issue or in question the right of these defendants (plaintiffs therein) to demand and receive from plaintiff, compensation for the water furnished by these defendants to plaintiff, under the laws or ordinances aforesaid, or under any other laws or ordinances.

And in like manner these defendants aver that the question as to whether or not it was the duty of these defendants to furnish water to these plaintiffs, free of charge, for any purpose whatever other than the extinguishment of fires during the pendency of the same, was not necessarily involved, was not put in issue, and was not in issue in that action aforesaid.

And these defendants deny that in said action it was adjudged or determined by this Honorable Court, in substance or effect, that these defendants were bound or compelled by the force or effect of the said laws or ordinances, or for any other cause or reason, to furnish the plaintiff, free of charge, water for any municipal purpose whatever. And they deny that it will so appear upon an inspection of the files and records of said cause in this Court.

And these defendants deny that the only question determined in said action, by said decree and judgment, was the said question as to the duty of these defendants to furnish the plaintiff water for

all or any municipal purpose, free of charge, and they deny that said question was involved or determined in said action at all. And they deny that this Honorable Court did determine that it was the duty of these defendants to furnish to plaintiff any water whatever, without charge or compensation therefor.

And defendants deny that any judgment whatever was rendered in said cause, prior to the commencement of this action, and, on the contrary, aver that such judgment as was entered in said cause was not entered of record therein until the 12th day of March, 1869, the day on which the amended complaint was filed in this cause, and the same was then entered up without notice to these defendants; and defendants, upon and according to their information and belief, aver that the same was entered at that time by the procurement of plaintiff for the express purpose of enabling plaintiff to plead the same in this action.

These defendants deny upon, and according to their information and belief, that under and by force and virtue of any Act or Acts of the Legislature of the State of California, or of any Order or Orders, Ordinance or Ordinances of the Board of Supervisors aforesaid, or for any other cause whatever, it has become, or is the duty of these defendants to furnish to plaintiff all water necessary, or any water within the limits of said city and county, or elsewhere, to the full capacity of the works held and controlled by these defendants, or to any extent whatever, free of charge to plaintiff, for all municipal purposes, or for any

municipal or other purpose whatever, except for the extinguishment of fires during the pendency of the same.

And in like manner they deny that the Chief Engineer or any other officer, agent, or employee of said city and county has, under the direction of the Board of Supervisors, or otherwise, the right to tap the pipes of these defendants, laid down in said city and county for the purpose of conducting water, or the right to connect hydrants therewith. And in like manner they deny that the said city and county, its Chief Engineer, or any of its officers, agents, or employees, has the right to take or receive water therefrom, free of charge, for any purpose whatever, except for the extinguishment of fires, during the pendency of the same.

Defendants deny that since the 13th day of February, 1865, or for any other length of time, they have furnished water to plaintiff, free of charge, for municipal purposes other than the extinguishment of fires during the pendency of the same; and, on the contrary, defendants aver that ever since the said 13th day of February, 1865, plaintiff, by its officers, agents, and employees, has been in the constant habit of taking, and has taken water from the pipes of these defendants, without consulting these defendants in relation thereto, and in violation of law and of the rights of defendants in the premises.

These defendants deny and aver that it is not true that there are no other means existing in said city and county from which plaintiff could be sup-

plied with pure, fresh water for municipal uses, except the water-pipes of these defendants, although they admit that there are no other means from which plaintiff can be so supplied without great cost and expense.

They deny that the means whereby fresh water can be supplied to said plaintiff is solely within the power and control of these defendants, their agents and servants, although they admit that the only water-works, so-called, within said city and county, are solely in the power and under the control of these defendants. And these defendants especially deny that said Water Works should be under or subject to the control of plaintiff or its officers, to the extent of obtaining therefrom water for municipal purposes, free of charge, or to any extent whatever. On the contrary, thereof, these defendants aver that all their said water-works and pipes, rights, and privileges are private property, established at great cost and expense to these defendants, and ought not to be under the control of plaintiff or its officers, to any extent whatever.

These defendants admit that it is their duty to furnish water free of charge to plaintiff for the extinguishment of fires during the pendency of the same, (but not for any other purpose), and this they have been at all times and still are ready and willing to do.

These defendants deny and aver that it is not true that they have threatened, or intend, unconditionally, (as averred in said complaint), to cut off and deprive plaintiff from the use of any water

flowing in the pipes of defendants within the limits of said city and county for any municipal uses or purposes other than the extinguishment of fires during the actual pendency of the same; but they admit that they have threatened, and do intend to cut off and deprive plaintiff from and of the use of water flowing in their said pipes for any and all municipal uses and purposes other than for the extinguishment of fires during the pendency of the same, unless the plaintiff consents to pay, and makes provision for paying, these defendants just compensation for the water which it uses from said pipes for purposes other than the extinguishment of fires during the pendency of the same as aforesaid. And defendants aver that they are, and at all times since the establishment of their works have been, ready and willing to furnish to said city and county all the fresh water which it may desire to use for any purpose whatever, upon receiving just compensation for so much as may be used by them from the works of defendants, for purposes other than the extinguishment of fires during the pendency of the same.

And these defendants deny that plaintiff is entitled to the use and enjoyment of the rights and privileges of taking water from the pipes of these defendants, free of charge, for any purpose whatever, except for the extinguishment of fires during the pendency of the same, and they deny that they have threatened or intended to deprive the plaintiff of any rights or privileges to which it is justly or otherwise entitled in the premises.

Wherefore, defendants pray judgment that the

prayer of said complaint be denied, and that said plaintiff's bill be dismissed with costs.

CHAS. N. FOX,
Attorney for defendants.

STATE OF CALIFORNIA
City and County of San Francisco. } ss.

W. F. Babcock, being duly sworn, deposes and says, that he is President of the Spring Valley Water Works, who made the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon the information or belief of said defendants, and as to those matters that he believes it to be true.

Subscribed and sworn to before me, this 19th day of March, A. D. 1869.

W. F. BABCOCK,
Pres't S. V. W. W.

GEORGE C. WALLER,
[SEAL.] Notary Public.

EXHIBIT "A."

An Act to extend the rights and privileges of the San Francisco City Water Works. Approved, April 8th, 1863.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. In accordance with the recom-

mendation of the Board of Supervisors of the City and County of San Francisco, expressed in Resolution number twenty-three hundred and twenty-four, passed January fifth, eighteen hundred and sixty-three, and approved January sixth, eighteen hundred and sixty-three, in relation to the San Francisco City Water Works, the said company are hereby relieved and discharged from any and all obligations whereby it has agreed to pay the said City and County of San Francisco five per cent. of its gross earnings.

Section 2. It is hereby provided that should any other company, person or persons, excepting the City and County of San Francisco, receive permission to introduce water for the purpose of supplying the said city and county therewith, no more favorable terms shall be granted to such company, person or persons than are now enjoyed by the San Francisco City Water Works without extending the same to the latter company.

Section 3. It is hereby provided that any rights, privileges or immunities now enjoyed by the Spring Valley Water Works, by virtue of an Act entitled "An Act to authorize George H. Ensign and others (owners of the Spring Valley Water Works) to lay down water-pipes in the public streets of the City and County of San Francisco," approved April twenty-third, eighteen hundred and fifty-eight, which are more favorable than the terms heretofore granted to the San Francisco City Water Works, shall be held and enjoyed by the said company.

Section 4. This Act shall take effect from and after its passage.

Stipulation that Answer to Amended Complaint should stand as the Answer to the Second Amended Complaint.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO
vs.
THE SPRING VALLEY WATER WORKS. } No. 4660.

In this case it is stipulated and agreed that, in case the motion now pending to strike plaintiff's second amended complaint from the files is denied, the answer to the first amended complaint shall stand as the answer to the said second amended complaint.

October 26, 1871.

W. C. BURNETT,
Plaintiff's Attorney.

CHAS. N. FOX,
Attorney for Defendant.

(Endorsed) Filed February 6, 1872.
WM. HARNEY, Clerk.
By S. OSBORNE, Deputy Clerk.

EXHIBIT NO. 3.

Judgment and Decree.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO
vs.
THE SPRING VALLEY WATER WORKS.
} No. 4660.

In open Court, November 11, A. D. 1872. 4660.

This cause came on regularly for trial. W. C. Burnett appeared as counsel for plaintiff, and Chas. N. Fox for defendant, and the cause was submitted to the Court and due consideration being had thereon, the Court orders that judgment be drawn and entered herein in favor of defendant and against the plaintiff.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the City and County of San Francisco, plaintiff, take nothing by this action against "Spring Valley Water Works Company," defendant, but that said defendant have and recover from said plaintiff its costs and disbursements incurred herein, amounting to the sum of $

Judgment recorded December 5, A. D 1872. C. 504.

Notice of Intention to Move for New Trial.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY of SAN FRANCISCO
vs.
THE SPRING VALLEY WATER WORKS. } No. 4660.

Take notice that the plaintiff above named intends to move the said Court for an order setting aside and vacating the judgment and decision heretofore rendered and entered on the 11th day of November, A. D. 1872, in the above-entitled action, and granting a new trial of said action, on the following grounds :

FIRST. Insufficiency of the evidence to justify the judgment and decision of the Court.

SECOND. That the said judgment and decision are against law.

THIRD. Error in law, occurring at the trial, and excepted to then and there by the party making this application, to wit : the plaintiff herein.

W. C. BURNETT,
City and County Attorney.

To CHARLES N. FOX, Esq., Attorney for Defendants, and to the Clerk of said Court.

San Francisco, Nov. 21, 1872.

(Endorsed) Service of the within original, by true copy hereof, admitted this 21st day of November, A. D. 1872.

CHAS. N. FOX,
Attorney for Defendant.

Filed November 21, 1872.
WM. HARNEY, Clerk.
By JOHN P. POOLE, Deputy Clerk.

EXHIBIT No. 4,

Statement on Motion for New Trial.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO,
vs.
THE SPRING VALLEY WATER WORKS. } No. 4660.

The said cause came on for trial, after filing the *remittitur* and order of the Supreme Court, and upon the second amended and supplemental complaint filed herein, and the answer to the first amended complaint, which by agreement, was to stand as the answer to said second amended and supplemental complaint, before the Honorable S. H. Dwinelle, Judge of said Judicial District, sitting without a jury, at the Court-room of said Court, in said city and county, on the 8th day of February, 1872, and upon said trial proceedings were had and evidence introduced as follows:

Mr. W. C. Burnett appeared on the part of the plaintiff as counsel, and Mr. Charles N. Fox as counsel on the part of the defendant.

Mr. Burnett made an opening statement of the ase, and read the second amended and supplemental complaint, and Mr. Fox, during the reading thereof, pointed out to the Court the variance between this complaint and the first amended complaint, on which the case went to the Supreme Court, and stated that the facts set forth in the new matter found in the second amended complaint were not denied by the answer, as it had

been agreed that the answer to the first amended complaint should stand as the answer to this complaint; that the only point he made upon such new matter was, that it was not an averment of a new fact, but simply the repetition in another form of a fact already stated and passed upon by the Supreme Court.

And at the conclusion of plaintiff's opening, Mr. Fox, for defendant, stated that as the case now stood, the only issue remaining to be tried before this Court, was whether the issues in this case had been adjudicated and determined in the former case of the Spring Valley Water Works vs. the City and County of San Francisco, so that the judgment in that case should form a bar to claim of defendant in this case, and that he should claim that all the other issues in this case had been passed upon and determined by the Supreme Court.

Mr. Burnett, on the part of the plaintiff herein, offered in evidence the judgment roll in the cause entitled the Spring Valley Water Works Company against the City and County of San Francisco, the same being cause numbered two thousand eight hundred and twenty-five (2825); but Mr. Fox, on the part of the defendant, objected to the introduction thereof in evidence, on the ground that it was incompetent, irrelevant, immaterial and inadmissible, under the pleadings; that said judgment-roll purports to recite a judgment entered after the commencement of the suit; that this suit was commenced on the 10th day of February, 1869, and the judgment recited in the

roll offered was entered on the 12th day of March, 1869. At this time Mr. Burnett, in obedience to a suggestion of the Court to send for the minutes, did send for such minutes, and stated to the Court that he would offer to prove by the book of minutes, that the order for judgment was entered June 1st, 1868, and that the trial was had on that day, and that it was only the clerical duty of entering up the judgment that was performed afterwards. Whereupon, Mr. Fox stated to the Court that he would concede that the order for judgment was made at the time mentioned by plaintiff's counsel, and that he would state his objection, assuming that plaintiff's attorney had such order in Court; and the defendant's counsel then stated, as further objection to the introduction in evidence of said judgment-roll, that the judgment therein recited was not entered until after the commencement of this action; and, secondly, that it appears, upon the face of said judgment-roll, that the action therein was not an action tendering such issues as averred in the second amended and supplemental complaint in this cause; that said judgment-roll appears to be in a case wherein suit was brought upon an express contract, and that the only issues raised therein were upon the allegation of the complaint therein upon such contract. Mr. Fox also objected that the judgment recited in said judgment-roll was not final, inasmuch as it was not proven that any notice of the rendition of such judgment had been given.

The Court overruled defendant's objections, and admitted said judgment-roll in evidence, and the same was read in evidence, as follows:

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE SPRING VALLEY WATER WORKS
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 2825.

The plaintiff complains of the defendant, and, for cause of action, shows:

That the plaintiff is a corporation, duly organized under the laws of the State of California, for the purpose of introducing pure, fresh water into the City and County of San Francisco, for the use of the inhabitants thereof, and has introduced the same and is now supplying water to said inhabitants.

That the defendant is a municipal corporation, duly organized under said laws. That hitherto, viz: in the month of February, 1865, the defendant made application, in writing, to the plaintiff for a supply of its said water to be used in irrigating Portsmouth Square in said city; that the plaintiff consented to furnish said supply, and it was then and there stipulated and agreed that the plaintiff, subject to all the usual rules and regulations adopted by the plaintiff in the management of its business of supplying and selling water, would furnish water from its pipes and mains, for the purpose aforesaid, at the rate of seventy-five cents per thousand gallons, to be ascertained and measured by metre, said price to be paid in United States gold coin, and that defendant would pay for the same, at said rate, in said coin, and whenever thereunto requested.

That a memorandum, in writing, of the said agreement was thereupon drawn up, and subscribed by the parties thereto, and that H. P. Coon, Mayor of said city, thereunto duly authorized, subscribed the same, then and there, in behalf of the defendant.

That afterwards, and on the ninth day of said February, the plaintiff began to supply, and has ever since supplied, said water for said purpose to the defendant, and has so furnished, up to the first of April, 1867, nine hundred and sixty-nine thousand nine hundred and seventy-five gallons of water, and was entitled to receive therefore the sum of seven hundred and twenty-seven dollars and forty-eight cents, in gold coin of the United States.

That the defendant, although often requested, has not hitherto paid the said sum, or any part thereof, but has hitherto wholly refused to pay the same.

And for a further and separate cause of action, the plaintiff shows, that the defendant is justly indebted to the plaintiff in the further sum of one thousand dollars, for one million gallons of water, furnished by plaintiff to the defendant, from the 9th day of February, 1865, to the 1st day of April, 1867. That the said water was furnished by plaintiff to defendant, at defendant's request, for the purpose of watering a certain piece of ground owned and possessed by the defendant, and known by the name of Portsmouth Square. That defendant then and there agreed with plaintiff to pay the plaintiff for the said water at its worth and value, and that the said water was worth one thousand dollars. But that the defendant, although often

requested to do so, has not hitherto paid the said sum nor any part thereof, but has wholly refused and neglected to pay the same.

Wherefore, the plaintiff prays judgment against the defendant for the sum of one thousand seven hundred and twenty-seven dollars and forty-eight cents, besides costs, and that the whole of said judgment, except the sum of one thousand dollars, be made payable in gold coin of the United States.

EUGENE LIES,
Attorney for plaintiff.

[Endorsed]—No. 2825, 15th District Court.

The Spring Valley Water Works vs. The City of San Francisco. Complaint *assumpsit.*

Filed May 4th. 1867.

WM. LOWEY, Clerk
By Octavius Bell, D. C.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE SPRING VALLEY WATER WORKS vs. THE CITY AND COUNTY OF SAN FRANCISCO	No. 2825.

Action brought in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, and the complaint filed in said City and County of San Francisco, in the office of the Clerk of said District Court.

The People of the State of California send Greeting to :

The City and County of San Francisco, defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county ; or, if served out of this county, but in this District, within twenty days ; otherwise, within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover from you the sum of $1,727.48, alleged to be due from you to plaintiff, for water supplied for the purpose of irrigating Portsmouth Square, as particularly set out in the complaint herein, to which reference is hereby made, with costs ; that said judgment, excepting $1,000 thereof, be payable in United States gold coin.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for said sum of $1,727.48, payable as aforesaid with costs as aforesaid.

Given under my hand and seal of the District Court of the Fifteenth Judicial District of the

State of California, in and for the City and County of San Francisco, this 4th day of May, in the year of our Lord, one thousand eight hundred and sixty-seven.

WM. LOWEY, Clerk.
[L. S.] By OCTAVIUS BELL, D. C.

OFFICE OF THE SHERIFF
Of the City and County of San Francisco, }

I hereby certify, that I received the within summons on the 4th day of May, A. D. 1867, and personally served the same on the 7th day of May, A. D. 1867, on the City and County of San Francisco, the within defendant, by delivering to H. P. Coon, Mayor of said defendant, personally, in the City and County of San Francisco, a copy of said summons, attached to a certified copy of the complaint in said action therein named.

Dated at San Francisco, this 7th day of May, 1867.

HENRY L. DAVIS, Sheriff,
By WM. H. SILVERTHORN, Under Sheriff.

(Endorsed) Filed May 9th, 1867.
WM. LOWEY, Clerk.
By OCTAVIUS BELL, Deputy Clerk.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE SPRING VALLEY WATER WORKS.
vs. } No. 2825.
THE CITY AND COUNTY OF SAN FRANCISCO.

The defendant, for answer to plaintiff's complaint, admits that the plaintiff is a corporation

duly organized under the laws of the State of California, for the purpose of introducing pure, fresh water into the City and County of San Francisco, for the use of the inhabitants thereof, and admits that the same has been introduced by said plaintiff into said City, and that the same is now being supplied by said plaintiff to said inhabitants. And defendant admits that said defendant is a municipal corporation, duly organized under said laws of said State of California.

But defendant denies that, at any time, either as stated in plaintiff's complaint, or otherwise, was any application, in writing or otherwise, made to plaintiff by defendant for supply of said water to irrigate Portsmouth Square, or for any other purpose; and defendant denies that any contract, agreement, or stipulation, as stated in plaintiff's complaint, or otherwise, was ever entered into for the furnishing of water by plaintiff to defendant. And defendant denies that any memorandum in writing, or any agreement whatsoever was ever drawn up and subscribed, either by the parties plaintiff or defendant, or their authorized agents, or by H. P. Coon, Mayor of said city and county.

And defendant denies that said H. P. Coon was authorized to enter into such contract or agreement, or to sign or subscribe such memorandum. On the contrary, defendant avers that no such power or authorization was ever given or granted to said H. P. Coon, Mayor as aforesaid. And defendant denies that, on the 9th day of February, or before or since, has defendant supplied, in any manner or for any purpose whatso-

ever, sixty-nine thousand nine hundred and seventy-five gallons of water, or any number of gallons whatsoever, or yet one gallon, and denies that plaintiff is entitled to receive from defendant the sum of seven hundred and twenty-seven dollars, or any other sum whatsoever, either in gold coin or any other currency.

And defendant, answering the separate cause of action in plaintiff's complaint, denies that defendant is indebted to the plaintiff in the sum of one thousand dollars, or any other sum or sums, for one million gallons of water, or for one gallon.

Defendant denies that any water whatsoever was furnished for any purpose, by plaintiff to defendant, from the 9th day of February, 1865, to the 1st of April, 1867. And defendant denies that defendant, at any time whatsoever, ever agreed with plaintiff to pay plaintiff for any water, at its worth or value, or otherwise, or that defendant ever requested plaintiff to furnish defendant with any water for any purpose whatsoever. And defendant denies that the water, so pretended to have been furnished, was worth one thousand dollars, or any other sum or sums whatsoever.

And defendant, further and separately answering the complaint of plaintiff, says, that whatever water has been furnished by said plaintiff to said defendant, for the purpose of watering or irrigating Portsmouth Square, has been furnished under and in pursuance of the laws of the State of California, the charter of the said plaintiff, the said Spring Valley Water Works, and various orders and ordinances of the said City and County of San

Francisco, this defendant, and that such laws, charter, orders and ordinances provided that the said plaintiff shall furnish the said defendant water, for the purpose of watering and irrigating Portsmouth Square, free of charge or expense, and that no pay or remuneration for water so furnished for the purpose aforesaid is to be asked by said plaintiff, nor given by said defendant. And defendant prays hence to be dismissed with costs.

HORACE M. HASTINGS,
City and County Attorney.

[Endorsed]

Fifteenth District Court of California. 2825. Spring Valley Water Works *vs.* The City and County of San Francisco. Answer. Due service of the within answer is hereby admitted this 14th day of June, 1867.

EUGENE LIES,
Attorney for Plaintiff.

Filed June 14, 1867.
WM. LOEWY, Clerk.
By OCTAVIUS BELL, Deputy Clerk.

HORACE M. HASTINGS,
City and County Attorney.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE SPRING VALLEY WATER WORKS
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 2825.

This cause coming on regularly to be heard, a

trial by jury having been waived, Eugene Lies, Esq., appeared as counsel for plaintiff, and H. M. Hastings, Esq., for the defendant. Witnesses were sworn and examined on the part of plaintiff. After argument of counsel, this cause was submitted to the Court for consideration and decision, and due consideration being had thereon, the Court orders that judgment be drawn and entered herein in favor of defendant, and against plaintiff for the costs of this action.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that the Spring Valley Water Works, plaintiff, do take nothing by this action as against the City and County of San Francisco, defendant, but that said defendant have and recover from the plaintiff said defendant's costs and disbursements, incurred in this action, amounting to the sum of

Judgment recorded March 12th, 1869. (B, p. 166.)

In the District Court of the Fifteenth Judical District of the State of California, in and for the City and County of San Francisco.

THE SPRING VALLEY WATER WORKS
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 2825.

I, Washington Bartlett, County Clerk of the City and County of San Francisco, State of California, and *ex officio* Clerk of the District Court of the Fifteenth Judicial District thereof, do hereby certify the foregoing to be a true copy of the

judgment entered in the above-entitled cause, and recorded in Judgment Book "B" of said Court, at page 166. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

Witness my hand and the seal of said District Court, this 12th day of March, A. D. 1869.

[SEAL.] WASHINGTON BARTLETT, Clerk.
By P. O. BARRY, Deputy Clerk.

(Endorsed.) Filed March 12, 1869.
WASHINGTON BARTLETT, Clerk.
By P. O. BARRY, Deputy Clerk.

Recorded Judgment Book "B," page 166.

To which ruling of the Court defendant s counsel then and there excepted.

Plaintiff's attorney here offered and read in evidence the minutes of this Court, as follows, viz.:

"June 1, 1868. Spring Valley Water Works "Company vs. The City and County of San Fran-"cisco. This cause was heretofore argued and "submitted to the Court, and due consideration "being had thereon, the Court ordered that judg-"ment be drawn and entered herein in favor of "defendant, and against the plaintiff, for the costs "of this action," the same being contained in Minute Book "B," page 777.

Hon. S. H. Dwinelle, the Judge of said Court, was then called as a witness on the part of plaintiff to testify as to what questions were submitted to and passed upon by him upon the trial of said case of the Spring Valley Water Works vs. The City and County of San Francisco, and, by consent, his statement was received as evidence. His Honor thereupon stated that he was the Judge

before whom said former case was tried; that the only question submitted to or passed upon by the Court in that case was, whether or not the water sued for had been furnished under any legal contract to pay for the same; whether the Mayor had the power to bind the city to pay for water ordered without any authorization of the Board of Supervisors; that the question whether or not the Water Works was bound to furnish the city with water for that or any other municipal use, free of charge, was not raised or considered by the Court, and none of the statutes or ordinances referred to or set out in the pleadings in this case were called to the attention of the Court upon that trial, or in any manner passed upon by the Court.

The testimony was here closed, and, upon argument of counsel, the cause was submitted to the Court for its decision and judgment, and thereafter, on the 11th day of November, A. D. 1872, the Court rendered judgment and decree in favor of the defendant, and against the plaintiff, for costs of suit, and that plaintiff take nothing by its suit herein, which judgment is still in full force and virtue.

The plaintiff specifies the following particulars wherein the evidence in this cause was insufficient to justify the decision and judgment and decree herein, as follows:

1st. The evidence did show that, for a long time before the commencement of this cause, it had been, then was and still is the duty of the defendant herein to furnish the plaintiff herein with pure, fresh water for all of the municipal

purposes of said plaintiff, free of charge, and without compensation.

2d. The evidence did not show that the defendant herein has any lawful right, or at any time has had any lawful right, to cut off from plaintiff the supply of water from defendant's pipes for the municipal purposes of the plaintiff, other than the extinguishment of fires, during the continuance of the same, in the event of plaintiff's refusal and neglect to pay defendant therefor.

3d. The evidence did not show that hertofore, between the fifteenth day of June, A. D. 1857, and the first day of December, A. D. 1858, the corporation mentioned in said Second Amended and Supplemental Complaint, and known as the San Francisco City Water Works, was, by the Satutes of this State and the Orders and Ordinances of the Board of Supervisors of the City and County of San Francisco, in that behalf duly passed and approved, authorized and required to introduce into the said city and county pure fresh water for fire, municipal. and all other purposes, which authority last aforesaid, and the rights thereunder. was accepted by the corporation last aforesaid; and that while the authority last aforesaid continued. and on the 16th day of September, A. D. 1868, the corporation last aforesaid did introduce into said city and county pure fresh water, for fire, municipal, and all other purposes, and continued from that time to introduce water, as last aforesaid, into said city and county, until the time of the conveyance, by the corporation last aforesaid, unto the defendant herein, on the 13th day of

February, A. D. 1865, and during all of that time had authority to introduce water, as last aforesaid; that ~~no~~ on the day and year last aforesaid, the said corporation, called the San Francisco City Water Works, by indenture of that date, duly executed, stamped, and delivered to defendant, did convey, set over, and transfer to defendant, all and singular its property, real, personal, and mixed, and all its franchises, rights, and privileges theretofore owned or held by it, including the said right to introduce into the said city and county pure fresh water, under the orders mentioned in said Second Amended and Supplemental Complaint, and from hence hitherto the defendant has held, and still holds and exercises all and singular the said rights and privileges, and has been thence hitherto, and is now yet engaged in the exercise and enjoyment of the said franchises and privileges, under and in pursuance of all and singular the terms and conditions and obligations of the said Acts of the Legislature, and Orders and Ordinances of the Board of Supervisors of said city and county, mentioned in said Second Amended and Supplemental Complaint, and that, from the date of said indenture, the said San Francisco City Water Works ceased to exercise any of the said franchises, and said defendant is, and since then has been, the only corporation or person engaged in introducing pure fresh water into said city and county; and, by reason thereof it appears, and by the facts admitted by the pleadings herein, to be true, that, at the time of the commencement of this cause, it was, and still is, the duty of the defendant to supply and furnish the plaintiff from defendant's

water pipes, pure, fresh water for all of the municipal purposes of the plaintiff, free of charge and without compensation, and the plaintiff's right to so have and receive the same.

4th. The evidence did show that, in the month of February, 1865. and subsequently to the 13th day of February, 1865, and while the several laws and ordinances mentioned in the second amended and supplemental complaint were in force, the defendant, the Spring Valley Water Works, did furnish and supply to the plaintiff nine hundred and sixty-nine thousand nine hundred and seventy-four gallons of water for municipal purposes other than the extinguishment of fires—to-wit: for the purpose of irrigating and watering a certain square in said city, called Portsmouth Square—and that said water was used by the plaintiff for the purpose of such irrigation, and not for any other purpose; and that the value of such water was then and there the sum of seven hundred and twenty-seven dollars and forty-eight cents, in United States gold coin.

That thereupon, the said defendant made claim against the plaintiff for said last-mentioned sum of money, as the value of the said water so furnished to and used by the plaintiff as aforesaid, and thereafter, to wit: on the 4th day of May, 1867, in this Honorable Court, the said defendant as plaintiff impleaded this plaintiff as defendant, in an action at law, of and concerning and for the recovery of said claim, for compensation for said water so furnished and used as aforesaid about the irrigation of said Portsmouth

Square, and said plaintiff as such defendant in said action appeared therein, and filed an answer and defense thereto, and, among other things, pleaded, as a defense to said action, in substance, that said defendant here (plaintiff in said action) was, by force and effect of said ordinances and laws, bound to furnish the said water in the said action mentioned, free of charge or expense to this plaintiff, and without any charge or remuneration therefor from this plaintiff.

And that in the said action there was, in the pleadings therein, and upon the trial thereof, distinctly brought in issue and in question the right of the said defendant here (plaintiff in said action) to demand and receive from this plaintiff compensation for water furnished by said defendant to the plaintiff, under said laws and ordinances aforesaid, and that thereupon in said action, it was adjudged and determined by this Honorable Court, in substance and to the effect, that the said defendant was bound and compelled, by the force and effect of the said laws and ordinances, to furnish this plaintiff, free of charge, not only all water necessary for the extinguishment of any fire, but necessary for all other municipal purposes within the limits of said City, and that thereupon judgment in favor of the said plaintiff here (defendant in said action) was duly entered, all of which several matters and things fully appear by reference to the pleadings, proceedings and judgment in said action, as the same remains upon the records of this Honorable Court, and that upon the trial of said action, the fact that the said

water had been furnished by the defendant here, for the plaintiff, and had been used by the plaintiff here, for the purpose of irrigating said Portsmouth Square, and not for the extinguishment of any fire, was distinctly proven, and the only question determined by said decree and judgment was the question, as to the duty of the said defendant here (plaintiff in said action) to furnish the plaintiff water for all municipal purposes in said City and County of San Francisco, free of charge and without compensation, and that in said action this Honorable Court did determine that it was the duty of the defendant here to furnish to this plaintiff all such water, without charge or compensation therefor. And that the said judgment and decision so entered, and given as aforesaid by this Honorable Court, has never been reversed, modified or set aside, in any manner, but the same is yet in full force and virtue.

5th. That all of the facts stated in the second amended and supplemental complaint, except the facts concerning the cause in this Court, mentioned therein, and numbered twenty-eight hundred and twenty-five (2825), are admitted by the answer thereto, to be true; and it appears, from such admitted facts, that it was at the time of the commencement of this cause, and still is the duty of defendant, herein, to supply and furnish the plaintiff herein, with pure, fresh water from defendant's water pipes, for all of the municipal purposes of the defendant in the City and County of San Francisco, free of charge and without compensation therefor, and the plaintiff's right to have and receive the same, free of charge and without

compensation therefor, and that plaintiff was and is entitled to a decree herein, restraining defendant from cutting off from plaintiff such supply of water. And that it was also in proof, by reason of the admission of the fact, in such pleadings, that at, and immediately preceding the time of the commencement of this cause, the defendant herein did threaten to, and fully intended to cut off from said plaintiff the supply of water from defendant's pipes, for all other municipal purposes than for the extinguishment of fires during the continuance thereof, unless this plaintiff would pay therefor, or provide for payment therefor.

The plaintiff proposes the foregoing statement on motion for a new trial in said cause.

Dated December 16th, 1872.

W. C. BURNETT,

City and County Attorney,
and Attorney for plaintiff.

(Endorsed) Filed December 16, 1872.

WM. HARNEY, Clerk.

By JOHN P. POOLE, Deputy Clerk.

The foregoing is a correct engrossed statement on motion for a new trial, and the motion may be heard and determined upon the foregoing as a statement correct in form, exceptions under the New Code of Civil Procedure not being required.

W. C. BURNETT,
Att'y for Plaintiff.

CHAS. N. FOX,
Att'y for Defendant.

(Endorsed) Filed January 18, 1873.

WM. HARNEY, Clerk.

By JOHN P. POOLE, Deputy Clerk.

Order Denying Plaintiff's Motion for a New Trial.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO,
vs.
THE SPRING VALLEY WATER WORKS. } No. 4660.

Dated February 6th, 1873.

On motion of W. C. Burnett, Esq., of counsel for plaintiff, and it appearing to the Court that an order denying the plaintiff's motion for a new trial herein, was made on the 24th day of January, A. D. 1873, and that through an error, said order was not entered; It is by the Court now here ordered, that plaintiff's motion for a new trial be, and the same is hereby denied, and that this order be entered, *nunc pro tunc*, as of January 24th, A. D. 1873, and before the statement of the Court upon denying said motion was filed and spread upon the minutes of this Court.

Judge's Statement on Decision of Motion for New Trial.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO
vs.
THE SPRING VALLEY WATER WORKS. } No. 4660.

This cause came on to be heard on plaintiff's motion for new trial, and was heard on the 24th day of January, A. D. 1873, on the pleadings and the agreed and settled statement on motion for new trial, made and filed herein on the 18th day of January, 1873, which pleadings, to wit: the second amended and supplemental complaint filed herein, and the answer to the first amended complaint standing as an answer to said second amended and supplemental complaint and statement on motion for new trial are hereby referred to and made a part of this statement. And the Court, having heard the arguments of counsel and duly considered the case, denied said motion, on the ground that it did not appear that any substantial error had been committed at the trial, or that the evidence was insufficient to justify the decision; to which ruling and decision of the Court the plaintiff, by its counsel, then and there excepted.

[Endorsed]

WM. HARNEY, Clerk.
By ROBT. MCKEE, Deputy.

Filed January 24, 1873.

Notice of Appeal.

In the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO *vs.* THE SPRING VALLEY WATER WORKS.	No. 4660

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the Supreme Court of the State of California from the judgment and decree made and entered in the said District Court of the Fifteenth Judicial District on the 11th day of November, A. D. 1872, and in favor of defendant in said action and against plaintiff and from the whole thereof, and also from the order made and entered on the 24th day of January, A. D. 1873, denying plaintiff's motion for a new trial therein in said action.

W. C. BURNETT,
Attorney for Plaintiff.

Dated this 27th day of January, A. D. 1873.

To the Clerk of said District Court, and to Charles N. Fox, Esq., Attorney for Defendant.

[Endorsed.] Due service of a copy of the within notice is hereby admitted to have been made this 27th day of January, A. D. 1873.

CHAS. N. FOX,
Att'y for Def't.

Filed January 27th, 1873.

WM. HARNEY, Clerk.

By JOHN P. POOLE, Deputy Clerk.

Endorsed Filed April 11. 1877
D. B. Woolf Clerk

In the Supreme Court of the State of California.

THE SPRING VALLEY WATER WORKS, *Petitioner,* vs. THE CITY AND COUNTY OF SAN FRANCISCO, *Respondent.*	5588.

July 5, 1877.—Writ quashed and proceedings dismissed.

McKINSTRY, J.

NRLES, J., concurring.

CROCKETT, J., RHODES, J., concurring opinions.

Mr. Chief Justice WALLACE, having been of Counsel for the City and County of San Francisco in the litigation between it and the Water Company, declined to express an opinion in this case.

July 28, 1877, filed Petition for Rehearing.

April 19, 1878, rehearing denied.

OFFICE OF THE
CLERK OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA.

I FRANK W. GROSS, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed, from page 4 to 116 of this Appendix, both inclusive, is a true and correct copy of the affidavit and petition for a writ of prohibition, and of the answer of defendants thereto, on file in my office, in the case of The Spring Valley Water Works, Petitioner, vs. The City and County of San Francisco, et al., Respondents, No. 5588, and of Order of July 5th, 1877, and of filing of July 28th, 1877, and of Final Order of April 19th, 1878, in said case, as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of December, A. D. 1881.

Seal

Frank. W. Gross

Clerk.

By C. Harlan

Deputy ~~Clerk~~

14-462
Friday.

Opinion and Decree

Submitted
Jan 4. 1882

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 667.

M. A. ROSENBLATT, COLLECTOR OF THE CITY OF SAINT LOUIS, APPELLANT.

vs.

WALTER S. JOHNSTON, RECEIVER OF THE NATIONAL BANK OF THE STATE OF MISSOURI.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 15, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 667.

M. A. ROSENBLATT, COLLECTOR OF THE CITY OF SAINT LOUIS, APPELLANT.

vs.

WALTER S. JOHNSTON, RECEIVER OF THE NATIONAL BANK OF THE STATE OF MISSOURI.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct.:

In the circuit court of the United States in and for said district.

Be it remembered that on the 30th day of September, A. D. 1880, at a regular stated term of the circuit court of the United States in and for the eastern district of Missouri, there was filed in said court a certain amended bill, in words and figures following, to wit:

In the circuit court of the United States in and for the eastern district of Missouri. In equity.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri.

M. A. Rosenblatt, collector of the city of St. Louis, a municipal corporation situated in the said eastern district of Missouri, said Rosenblatt, being a citizen of the State of Missouri, brings this his annexed bill against Walter S. Johnston, receiver of the National Bank of the State of Missouri, and a citizen of the State of Missouri.

And thereupon your orator complains and says that he is the
2 collector of taxes within and for the city of St. Louis aforesaid, duly elected, commissioned, and qualified, and authorized and empowered by law to collect the State, city, and school taxes levied on property situated within the city of St. Louis aforesaid.

That the defendant, Walter S. Johnston, is the receiver of the National Bank of the State of Missouri, a banking institution and body corporate duly incorporated in pursuance of the acts of Congress, approved June 3, 1864, and the amendments thereto, entitled "An act to provide a national currency," and having its residence and situs in the above district.

That the National Bank of the State of Missouri, incorporated as aforesaid, prosecuted the business of banking as a national banking association at St. Louis, in the district aforesaid, up to and inclusive of the 19th day of June, 1877, when it suspended payment, and a few days afterwards it was declared by the Comptroller of the Currency to be insolvent, and was placed under the control of the defendant, Johnston, as receiver, according to the laws of the United States in such cases made and provided.

That upon the happening of the insolvency of the National
3 Bank of the State of Missouri as aforesaid the shares of stock in said banking association became, and ever since have been and are now, absolutely worthless and of no value whatsoever.

That under and by virtue of the proceedings aforesaid the personal assets and personal property of said banking association passed into the possession and custody of said receiver, defendant herein, and have remained in his possession and have been held by him in the city of St. Louis aforesaid from June, 1877, to the present time, except as the same have been and are being disposed of in the settlement and liquidation of the affairs and obligations of said bank, under and in accordance with the act of Congress aforesaid and its amendments.

That said personal assets and personal property from June, 1877, when they ceased to be possessed by the bank and reached the possession of the receiver, were subject to taxation under the laws of Missouri for the support of the State government, the government of the

city of St. Louis, and the public schools, in like manner and to the same extent and effect as all other personal property not ex-
4 empted from taxation in the city of St. Louis during the same period was taxable by law.

That said personal property in the possession of said Johnston, receiver as aforesaid, at St. Louis aforesaid, was, on August 1, 1877, pursuant to the general revenue law of Missouri, entitled "An act concerning the assessment and collection of the revenue," approved March 30, 1872, and the amendments thereto, assessed by the proper revenue officer of the State at the valuation of 1,600,000 dollars for the taxes of 1878, being for the year commencing August 1, 1877; and the taxes due thereon, according to law, were duly levied and assessed in said valuation by the proper revenue officer of the State of Missouri, and they amounted in the aggregate for said year to the sum of 41,600 dollars, of which the amount of 6,400 dollars was for State purposes, 7,200 dollars for the support of schools, and 28,000 dollars for the municipal purposes of the city of St. Louis.

That in like manner and on August 1, 1878, and pursuant to the said act of March 30, 1872, and the amendments thereto, the personal property and assets of the character aforesaid in the possession of
5 said defendant as receiver as aforesaid, in the city of St. Louis aforesaid, on said August 1, 1878, were assessed by the proper revenue officer of the State at the valuation of 1,600,000 dollars for the taxes of 1879, being for the year commencing August 1, 1878; and the taxes due thereon, according to law, were duly levied and assessed on said valuation by the proper revenue officer of the State of Missouri, and they amounted in the aggregate for said year to the sum of 41,600 dollars, of which the amount of 6,400 was for State purposes, 7,200 for the support of schools, and 28,000 dollars for the municipal purposes of the city of St. Louis.

That payment of said taxes has been duly demanded of defendant by complainant and refused, and certified copies of said tax-bills are hereto attached, marked Exhibit A and B.

That said defendent, as receiver of said bank, has ample funds in his custody, or standing to his credit in the United States Treasury, which funds were produced by the sale of the personal assets and property of said insolvent banking association aforesaid, being the same personal assets and property assessed and taxed as aforesaid, to pay the tax bills aforesaid.

6 That by the revenue law of Missouri aforesaid, and the amendments thereto, no remedy is given or provided by a suit at law by the collector upon a personal tax bill; and the only remedy provided by said law to enforce the payment of personal tax bills is by a levy by the collector upon the personal good, and property themselves and the sale of a suffic'ent portion thereof to liquidate the taxes thereon.

That in the present case the tax-bills aforesaid cannot be levied upon the personal property and assets aforesaid, being the property upon which the taxes embraced in said bills were levied, for the reason that said personal property and assets have been converted into cash and have been sold and disposed of by defendant and have passed from his possession, and the cash representing the same is now held by defendant in such manner as to make it impossible for plaintiff to levy said tax bill thereon.

That by the law of Missouri said taxes aforesaid are an equitable lien upon the property upon which they were levied and the proceeds thereof.

7 Wherefore it is prayed that this honorable court will, by its decree, order, adjudge, and direct that the defendant pay the above-mentioned tax bill, with the interest and penalties due thereon, & that the complainant have such other and further relief as may be proper, and recover his costs, and your orator, as in duty bound, will ever pray, etc.

M. A. ROSENBLATT.

LEVERETT BELL,
Solicitor for Complainant.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

M. A. Rosenblatt, being duly sworn, says that he is the complainant in the foregoing amended bill named, and has read the same and knows the contents thereof, and that the matter and facts therein stated are true.

M. A. ROSENBLATT.

Subscribed and sworn to before me this 30' day of September, A. D. 1880.

[SEAL.] J. H. McENTIRE,
Notary Public.

EXHIBIT A.

City book 6.—Bill 109.—State, school, and city taxes for 1878.

Received of National Bank, State of Mo., dollars.
Residence: ; Walter S. Johnston, receiver. Being the amount of State, school, and city taxes for the year 1878, in St. Louis City, on real estate, as below detailed, and on personal property.

City block.	Street or avenue.	Front.	Deep.	Addition or survey.	Bl'k.	Lot.	North.	East.	South.	West.	Specified valuation.
										Personal property...	1,600,000
										Total.....	1,600,000

Designation of taxes.			Aggregate of assessed value.	Amount of taxes.
				Dolls. Cts.
State.	Revenue	0.20 cents on $100	1,600,000	6,400 00
	Interest	0.20 cents on $100		
	Total	0.40 cents on $100		
Public school.	General	0.40 cents on $100	.....	7,200 00
	Indebtedness	0.45 cents on $100		
	Total	0.45 cents on $100		
City.	Municipal purposes	$1.00 on $100	.....	28,000 00
	Interest on valid indebtedness	0.75 cts on $100		
	Total	$1.75 on $100		
Total			.....	41,600 00

By , *Collector*,
, *Deputy*.

ST. LOUIS, , 187 .

(Written across the face in original in red ink:) A true copy of tax record for the year 1878.
E. L. ADREON, *Comptroller*,
Per M. C. T., *Clk.*

EXHIBIT B.

City book 13.—*Bill* 519.—*State, school, and city taxes for* 1879.

Received of Walter S. Johnston, receiver of National Bank, State of Missouri, dollars, Residence: . Being the amount of State, school, and city taxes for the year 1879, in St. Louis City, on real estate, as below detailed, and on personal property.

City block.	Street or avenue.	Front.	Deep.	Addition or survey.	Blk.	Lot.	North.	East.	South.	West.	Specified valuati n.
										Personal property	1, 600, 000
										Total	1, 600, 000

Designation of taxes.		Aggregate of assessed value.	Amount of taxes.
			Dolls. Cts.
State.	Revenue ..... 0.20 cents on $100	1, 600, 000	6, 4[illegible] 0 00
	Interest ..... 0.20 cents on $100		
	Total ..... 0.04 cents on $100		
Public school.	General ..... 0.40 cents on $100	.....	7, 200 00
	Indebtedness ..... 0.05 cents on $100		
	Total ..... 0.45 cents on $100		
City.	Municipal purposes ..... $1.00 on $100	.....	28, 000 00
	Interest on valid indebtedness ..... 0.75 cts. on $100		
	Total ..... $1.75 on $100		
Total		.....	41, 600 00

, *Collector*,
By , *Deputy*.

ST. LOUIS, , 187 .
(Written across the face of original:) A true copy of tax record for the year 1879.
E. L. ADREON, *Comptroller*,
Per M. C. T., *Clk*.

To which amended bill the defendant entered his appearance and refiled his demurrer in words and figures following, to wit:

8 In the circuit court of the United States for the eastern district of Missouri. In equity.

M. A. ROSENBLATT, COLLECTOR, &C., complainant,
vs.
WALTER S. JOHNSTON, RECEIVER, &C., defendant.
} No. 1592.

Demurrer of said defendant to the bill of complaint of said complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs in law to the said bill, and for cause of demurrer shows that the said complainant has not, by his said bill,

made such a case as entitles him in a court of equity to any relief against this defendant touching the matters contained in the said bill, or any of such matter; wherefore he prays judgment.

HENDERSON & SHIELDS,
J. M. & C. H. KRUM,
Solicitors for Defendant.

9 I, one of said solicitors, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

CHESTER H. KRUM.

STATE OF MISSOURI,
City of St. Louis, ss:

Walter S. Johnston, said defendant, makes oath and says that the foregoing demurrer is not interposed for delay.

WALTER S. JOHNSTON.

Subscribed & sworn before me this 23rd day of March, 1880.
[SEAL.] EDW'D P. CURTIS,
Notary Public.

And on the 30th day of October, A. D. 1880, at a regular stated term of the circuit court of the United States in and for said district, the following proceedings appear of record in said cause, to wit:

Amended bill dismissed.

M. A. ROSENBLATT, COLLECTOR, &c.,
vs.
WALTER S. JOHNSTON, RECEIVER, &c.

Now comes the complainant, by Leverett Bell, esquire, his solicitor, and by leave of court files his amended bill herein. And there-
10 upon the said defendant, by leave, refiles his demurrer to the original bill to stand as a demurrer to the said amended bill. And the said cause now coming on to be heard upon said demurrer, and the court having fully heard and considered the same, it is now ordered that said demurrer be sustained, and that said amended bill be, and the same is, dismissed.

And thereupon, on motion of said complainant, an appeal is allowed from the decree of this court on the filing and approval of a good and sufficient bond herein in the sum of five hundred dollars.

And afterwards, to wit, on the first day of October, 1880, the following appears of record in said cause, to wit:

Appeal allowed.

M. A. ROSENBLATT, COLLECTOR, &c.,
vs.
WALTER S. JOHNSTON, RECEIVER, &c.

Now comes the complainant and presents to the court his appeal bond herein, which is approved and ordered to be filed.

And thereupon it is ordered that the clerk of this court make up and certify to the Supreme Court of the United States a true transcript of the record herein.

11 Know all men by these presents, that we, Myer A. Rosenblatt, Leverett Bell, and E. L. Adreon, are held and firmly bound unto Walter S. Johnston, receiver of the National Bank of the State of Missouri, in the full and just sum of five hundred dollars; to be paid to the said Walter S. Johnston, receiver of the National Bank of the State of Missouri, his successors, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of October, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at the September term, 1880, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Myer A. Rosenblatt, collector of the city of St. Louis, plaintiff, and Walter S. Johnston, receiver of the National Bank of the State of Missouri, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained an appeal of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, 1880:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

M. A. ROSENBLATT. [SEAL.]
LEVERETT BELL. [SEAL.]
E. L. ADREON. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

12 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true transcript of the record and proceedings in case No. 1592, of M. A. Rosenblatt, collector, &c., plaintiff, against Walter S. Johnston, receiver, &c., defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this fifth day of October, in the year of our Lord eighteen hundred and eighty.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsed:) No. . United States circuit court, eastern district of Missouri. M. A. Rosenblatt, collector, &c., against Walter S. Johnston, receiver, &c. Duly certified copy of the in the above-entitled cause.

(Indorsement on cover:) No. 667. M. A. Rosenblatt, collector of the city of St. Louis, appellant, vs. Walter S. Johnston, receiver of the National Bank of the State of Missouri. E. Missouri C. C. U. S. Filed 15th October, 1880.

OFFICE SUPREME COURT, U.
FILED
DEC 20 1881

SUPREME COURT

OF THE UNITED STATES.

No. 667.

October Term, 1881.

M. A. ROSENBLATT, COLLECTOR OF THE CITY OF ST. LOUIS,

Appellant,

vs.

WALTER S. JOHNSTON, RECEIVER OF THE NATIONAL BANK OF THE STATE OF MISSOURI,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUBMITTED UNDER RULE 20.

STATEMENT AND ARGUMENT FOR APPELLANT BY LEVERETT BELL, OF COUNSEL.

ST. LOUIS:
C. R. BARNS, PRINTER.
1881.

SUPREME COURT

OF THE UNITED STATES.

No. 667.

October Term, 1881.

M. A. ROSENBLATT, COLLECTOR OF THE CITY OF ST. LOUIS,

Appellant,

vs.

WALTER S. JOHNSTON, RECEIVER OF THE NATIONAL BANK OF THE STATE OF MISSOURI,

Respondent.

APPELLANT'S STATEMENT AND ARGUMENT.

STATEMENT.

This case was commenced in the circuit court of the United States for the eastern district of Missouri, by a bill in equity being filed by M. A. Rosenblatt, (appellant here,) tax collector of the city of St. Louis, against Walter S. Johnston, receiver of the National Bank of the State of Missouri.

It is set out in the amended bill filed September 30th, 1880, that Rosenblatt is the collector of taxes for the city of St. Louis, charged with the duty of collecting the state, city and school taxes levied on property situated in the city of St. Louis. That Johnston is the receiver of the National Bank of the State of Missouri, a banking institution duly incorporated in pursuance of the act of congress, approved June 3, 1864 and the amendments thereto providing a national currency, and having its residence and situs in said district.

That said bank, incorporated as aforesaid, prosecuted the business of banking as a national banking association at St. Louis, in said district, up to and inclusive of June 19, 1877, when it suspended payment, and a few days afterwards it was declared by the comptroller of the currency to be insolvent, and was placed under control of the defendant Johnston as receiver, according to the laws of the United States in such cases made and provided. That upon the happening of said insolvency the shares of stock in said banking association became and ever since have been, and are now, absolutely worthless and of no value whatsoever. That under and by virtue of the proceedings aforesaid the personal assets and personal property of said banking association passed into the possession and custody of said receiver, and have remained in his possession, and have been held by him in the city of St. Louis from June, 1877 to the present time, except as the same have been and are being disposed of in the settlement and liquidation of the affairs and obligations of said bank, under the acts of congress aforesaid. That said personal property and assets from June, 1877, when they ceased to be possessed by the bank and reached the possession of the receiver, were subject to taxation under the laws of Missouri for the support of the state government, the government of the city of St. Louis and the

public schools in like manner, and to the same extent and effect as all other personal property not exempted from taxation in the city of St. Louis, during the same period was taxable by law.

That said personal property in the possession of said Johnston, receiver at St. Louis aforesaid, was on August 1, 1877 pursuant to the general revenue law of Missouri, entitled "an act concerning the assessment and collection of the revenue," approved March 30, 1872 and the amendments thereto, assessed by the proper revenue officer of the state at the valuation $1,600,000 for the taxes of 1878, being for the year commencing August 1, 1877, and the taxes due thereon according to law were duly levied and assessed on said valuation by the proper revenue officer of said state, and they amounted in the aggregate for said year to the sum of $41,600 of which the amount of $6,400 was for state purposes, $7,200 for the support of schools, and $28,000 for municipal purposes of the city of St. Louis. That in like manner and on August 1, 1878 and pursuant to the said act of March 30, 1872 and the amendments thereto, the personal property and assets of the character aforesaid in the possession of defendant as receiver in the city of St. Louis on August 1, 1878, were assessed by the proper revenue officer of the state at the valuation of $1,600,000 for the taxes of 1879, being for the year commencing August 1, 1878, and the taxes due thereon according to law were duly levied and assessed on said valuation by the proper revenue officer of the State of Missouri, and they amounted in the aggregate for said year to the sum of $41,600 of which the amount of $6,400 was for state purposes, $7,200 for the support of schools, and $28,000 for municipal purposes of the city of St. Louis. That payment of said taxes has been duly demanded of defendant and refused, and copies of the tax bills are attached to the bill of complaint as exhibits.

That defendant as receiver has ample funds in his custody or standing to his credit in the United States treasury, which funds were produced by the sale of the personal assets and property of said banking association, being the same personal assets and property assessed and taxed as aforesaid, to pay said tax bills. That by the said revenue law of Missouri no remedy is given or provided by a suit at law on personal tax bills; and the only remedy provided by said law to enforce the payment of personal tax bills is by a levy by the collector on the goods and property themselves and the sale of a sufficient amount thereof to liquidate the taxes thereon. That in the present case the said tax bills cannot be levied on said personal property and assets embraced in said bills, because said property and assets have been converted into cash and have been sold and disposed of by the defendant and have passed from his possession, and the cash representing the same is now held by the defendant in such manner as to make it impossible for the complainant to levy said tax bills thereon. That by the law of Missouri said taxes aforesaid are an equitable lien on the property on which they were levied and the proceeds thereof.

A decree is asked, ordering the defendant to pay the tax bills, etc. Record, pp. 1, 2, 3.

The defendant demurred to the bill on the ground that the complainant has not by his bill made such a case as entitles him to any relief in a court of equity. Record, pp. 4, 5.

The demurrer was sustained and the amended bill dismissed, and an appeal to this court duly granted and perfected, October 30, 1880. Record, p. 5.

QUESTIONS.

1. Is the personal property of an insolvent national bank in the possession of a receiver appointed under the national banking act, subject to taxation by the state and local authorities at the place where said property is located?

2. Is a bill on behalf of the collector of the state and local revenue to enforce an equitable lien for said taxes against the proceeds of said property in the hands of the receiver, within the equity jurisdiction of the United States?

ASSIGNMENT OF ERRORS.

The appellant alleges that the court erred in sustaining the demurrer to the amended bill, and that said demurrer should have been overruled.

ARGUMENT.

1. In support of the position that the complainant is entitled to relief in equity under the allegations of the bill, the first point to be considered is whether the property mentioned is subjected to taxation by the laws of Missouri. The property in question consists of the personal assets and personal property of the National Bank of the State of Missouri. This institution was organized and incorporated under the national banking law, and was prosecuting the business of banking at St. Louis prior to June 19, 1877, when it suspended payment, and a few days afterwards it was declared to be insolvent by the comptroller of the currency, and said property passed to the possession of the defendant Johnson, who was duly appointed receiver of said bank pursuant to the laws of the United States governing such cases. The assessment

of property for taxation in Missouri is made, as will be hereafter shown, as of the first day of August in each year. The taxing year commences on the first day of August. On the first day of August, 1877, the taxes for the year commencing on that day, and which are called the taxes of 1878 because the tax bills therefor become due and payable in 1878, were levied and assessed; and on August 1st, 1878, the taxes for 1879 were levied and assessed. The state law contains this provision: "Every person owning or holding property on the first day of August, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year." *See Laws of Missouri for 1872, p. 95, Section 60; 2 Wagner's Missouri Statutes, 1872, p. 1170, § 59.*

The tax levy applies to all property except such as is exempted by law from taxation. The sections of the state law on the subject are as follows:

"SECTION 1. For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

"SEC. 2. The following subjects are exempt from taxation: First—All persons belonging to the army of the United States. Second—Lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States. Third—Lands and other property belonging to this State. Fourth—Lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments, and all public squares and lots kept open for health, use or ornament. Fifth—Lands or lots of ground granted by the United States or this state

to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease." *Laws of Mo. 1872, p. 84; 2 Wag. Mo. Stat. 1872, p. 1158.*

"SEC. 1. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes." *Laws of Mo.* 1877, *p.* 393.

"SEC. 7. There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property subject by law to taxation in this state, one-fifth of one per centum for state revenue, and one-fifth of one per centum for the payment of all state indebtedness." *Laws of Mo.* 1877, *p.* 377, *Sec.* 2.

The intention of the law that no property subject to taxation shall escape taxation, is evinced by the following section:

"SEC. 8.—The term 'real property,' 'real estate, 'land,' or 'lot,' wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon, and all rights and priviliges belonging or in anywise pertaining thereto, except where the same may be otherwise denominated by this act. The terms 'bonds,' or 'stocks,' wherever used in this act, shall be held to mean and include bonds or stocks of whatsoever kind, whether issued by incorporated or unincorpor-

ated companies, towns, townships, cities, counties, states or other corporations, held or controlled by persons residing in this state, whether for themselves or as guardians, trustees or agents, on which the holder or owner thereof is receiving or is entitled to receive interest for themselves or others. The terms 'capital stock' and 'shares of capital stock,' wherever used in this act, shall be held to mean and include the capital stock of every association, corporation, joint stock or other company, the stock or capital of which is or may be divided into shares which are transferable by the owner, for the taxation of the capital stock of which association, corporation, joint stock or other company, no special provision is made by this act, held by persons residing in this state, either for themselves or as guardians, executors, administrators, trustees or agents. The term 'personal property,' wherever used in this act, shall be held to mean and include bonds, stocks, moneys, credits, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stock, profits or means, by whatsoever name they may be designated; every share or portion, right or interest, either legal or equitable, in and to every ship, vessel or boat, of whatsoever name or description, whether such ship, vessel or boat shall be within the jurisdiction of this state or elsewhere, and whether the same shall have been enrolled, registered or licensed at any collector's office, or within any county or collector's district in this state or not; the stock of nurseries, growing on leased land or in the hands of nurserymen, which has been separated from the soil where growing, and every tangible thing being subject of ownership, whether animate or inanimate, and not forming part of any parcel of real property as hereinbefore defined. The term 'money'

or 'moneys,' wherever used in this act, shall be held to mean gold, silver or other coin and paper or other currency used in barter and trade as money. The term 'credits,' wherever used in this act, shall be held to mean and include every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand, and every claim or demand for money, interest, or other valuable thing due or to become due, or every annuity or sum of money receivable at stated periods, including pay and salaries accrued or due for any purpose whatever, and all income or interest accruing from government bonds, and all money loaned or invested, and all indebtedness secured by deed, contract, mortgage or pledge of property of whatsoever kind: *Provided*, That pensions due and to be received from the United States shall not be held to be annuities within the meaning of this act. The term 'property,' wherever used in this act, shall be held to mean and include every tangible or intangible thing being the subject of ownership, whether animate or inanimate, real or personal. The term 'oath,' wherever used in this act, shall be held to mean oath or affirmation. Every word in this act importing the masculine gender may extend and be applied to females as well as males; and the word 'person,' as used in this act, shall be held to mean and include person, firm, company, corporation, or otherwise, whenever the case may so require its use or application. The term 'assessor' or 'assessors,' whenever used in this act, shall be held to mean and refer to county, township, city, town or district assessors, as the case may require. The term 'collector' or 'collectors,' wherever used in this act, shall be held to mean and refer to the county, township, city, town or district collectors, as the case may require."—*Laws of Mo.*, 1872, *p.* 85; 2 *Wag. Mo. Stat.*, 1872, *p.* 1,159.

The mode of making the assessment is prescribed as follows:

"SECTION 28. The assessor, or his deputy or deputies, shall, between the first days of August and January, and after being furnished with the necessary books and blanks by the county clerk, at the expense of the county, proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof in the manner following, to-wit: He shall call at the office, place of doing business or residence of each person required by this act to list property, and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise, which may be required to pay a license tax, being in any county in this state, in accordance with the provisions of this act; and the person listing the property shall enter a true and correct statement of such property in a printed or written blank, prepared for that purpose, which statement, after being filled out, shall be signed and sworn to to the extent required by this act, by the person listing the property, and delivered to the assessor. Such list shall contain:

"*First*—A list of all the real estate and its value.

"*Second*—A list of all the live stock, showing the number of horses, mares and geldings, and their value; the number of asses and jennets, and their value; the number of mules, and their value; the number of neat cattle, and their value; the number of sheep, and their value; the number of hogs, and their value, and all other live stock, and its value.

"*Third*—An aggregate statement of all the farm machinery and implements, and their value.

"*Fourth*—A statement of household property, including the number of pianos and other musical instruments,

clocks, watches, chains and appendages, sewing machines, gold and silver plate, jewelry, household and kitchen furniture, and the value thereof.

"*Fifth*—Money on hand.

"*Sixth*—Money deposited in any bank or other safe place.

"*Seventh*—An aggregate statement of all solvent notes unsecured by mortgage or deed of trust.

"*Eighth*—An aggregate statement of all solvent notes secured by mortgage or deed of trust.

"*Ninth*—An aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies.

"*Tenth*—All other property not above enumerated (except merchandise) and its value, under this head, shall be included all pleasure carriages of all kinds, all shares of stock or interest held in steamboats, keel-boats, wharf-boats and all other vessels, all toll-bridges, all printing presses, type and machinery therewith connected, all shot towers, and all machinery therewith connected, all smelting furnaces and all machinery therewith connected, all grist-mills, sawmills, oil mills, tobacco, hemp and cotton factories, tobacco stemmeries, rope-walks, manufactories of iron, nails, glass, clocks, and all other property belonging to manufactories of whatever kind, all wool carding machines, all distilleries, breweries, and all tanneries, all iron, copper, brass and other foundries, all post coaches, carriages, wagons and other vehicles used by any person in the transportation of mails, (except railway carriages), all carriages, hacks, wagons, buggies and other vehicles of every kind and description kept or used by livery-men, all carts, hacks, omnibuses and other vehicles used in the transportation of persons, (except railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation."—*Laws of Mo. of* 1877, *p.* 377.

The oath required of one owning or having the custody of property subject to taxation is as follows:

"Section 31. The oath to be signed and sworn to by each person making the statement of property required by this act, shall be as follows: I * * * do solemnly swear, or affirm, that the foregoing list contains a true and correct statement of all the property made taxable by the laws of the state of Missouri, including therein the number of houses, number of neat cattle, number of sheep, number of hogs, number of asses and jennets, number of mules, all other live stock, all farm machinery and implements, household property, musical instruments, clocks, watches, chains and appendages, sewing machines, gold and silver-plate, jewelry, household and kitchen furniture, money on hand, money deposited, notes unsecured by mortgage or deed of trust, all bonds, whether state, county, town, city, township, or of incorporated, or unincorporated companies, and all other property, and its value, which I owned on the first day of August, 18 * * , or which I had under my charge or management, or any money or property due me on said day from solvent persons or companies, on notes, accounts or otherwise, as fully and as specifically as I am required to make a return thereof under section twenty-eight of the revenue law of this state; and I do further solemnly swear, or affirm, that I have not sent or taken, or caused to be sent or taken, any property, money or bills, bonds or notes, or other securities or evidences of debts, out of this state to avoid taxation, so help me God." Any person who shall refuse to make oath to his list, when required so to do by the assessor or his deputy, shall be subject to a fine of not less than ten dollars nor more than one thousand dollars, to be recovered by suit in the name of the state of Missouri, or by indictment; and no property shall be exempt from executions issued

on judgments by suits or indictments under the provisions of this section. The list and oath required by this section shall be, by the assessor, after he has completed his assessor's books, filed in the office of the county clerk, and by him, after entering the filing of the same thereon, be preserved and safely kept. The courts having criminal jurisdiction shall, at each term, give this section in charge of the grand jury, who shall have the authority to examine such lists, with a view of inquiring into the correctness of such lists; and no such list shall be altered, changed or amended after it is filed with the county clerk, except by order of the county court; and any person who shall alter, change or amend any such list, without such order, shall, upon conviction, be fined not less than ten nor more than one hundred dollars, and every county clerk or deputy county clerk, who shall knowingly permit any such list to be altered, changed or amended without such order, shall forfeit one hundred dollars, to be recovered by suit upon his official bond." *Laws of Mo. of* 1877, *p.* 378.

Banking corporations are taxed in the following manner:

"SECTION 35. The property of manufacturing companies and other corporations named in chapter sixty-nine of the general statutes of Missouri, and of all other corporations, the taxation of which is not otherwise provided by law, shall be assessed and taxed as the property of individuals. Persons owning shares of stock in banks or any joint stock institution, or association, doing a banking business, * * * * * * * * incorporated under or by any law of the United States, or of this state, are not required to deliver to the assessor a list thereof; but the president or other chief officer of such coporation shall, under oath, deliver

to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same, and shall also state the actual cash value of such stock and all the property belonging to such corporations. In estimating the value of such stock and property, the officer making the same shall estimate and include all reserve funds, undivided profits, premiums or earnings, and all other values belonging to such corporations, which cash value shall be assessed and taxed as other personal property. Insurance companies or any corporation doing business on the mutual plan without capital stock, shall make like returns of the net value of all assets or values belonging thereto, which net value shall be assessed and taxed in like manner. Private bankers, brokers, money brokers and exchange dealers shall in like manner make return of all moneys or values of any description invested in or used in their business, which shall be taxed as other personal property: *Provided, however*, That the license hereafter required to be paid by such bankers, brokers and dealers, in addition to such taxes shall not exceed one hundred dollars per annum."

"SEC. 36. The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

"SEC. 37. If the president or other chief officer of any such corporation fail to comply with the provision of this act, he shall forfeit to the state the sum of one thousand dollars, to be recovered by indictment in any court of competent jurisdiction." *Laws of Mo.*, 1872, *pp.* 90, 91; 2 *Wag. Mo. Stat.* 1872, *pp.* 1165–6.

The duties of the assessor are defined in Section 54: "The assessor shall value and assess all the property on the assessor's books, according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation," etc. *Laws of Mo.*, 1877, *p.* 380.

For the purposes of this hearing the allegations of fact contained in the bill are to be taken as true. It appears from them that on August 1, 1877, and on August 1, 1878, the defendant had in his possession at St. Louis, Missouri, personal property of the value of $1,600,000. This property was in the possession of defendant as receiver of the National Bank of the State of Missouri, and had formerly been the property of said bank. The bank closed its doors on June 19, 1877, and never afterwards prosecuted the business of banking. It was insolvent on said day, and so declared to be by the comptroller of the currency, and the shares of the capital stock of said bank became and were absolutely worthless and possessed no value whatsoever from and after June 19, 1877. The property of the National Bank of the State of Missouri was not taxable on August 1, 1877, in the manner provided in section 35 of the state law above set out, because on said day said national bank was not "*doing a banking business*" as specified in said section, and had no "*president or other chief officers;*" and further because the stock possessed no value. The liabilities of the institution exceeded its resources; it was insolvent and no taxable value was represented by the capital stock of the institution. The personal property in the custody of the receiver on August 1, 1877, and on August 1, 1878, was, however, taxable in the same manner and to the same extent as all other personal property in St. Louis on said days. It was property

which the receiver had under his charge and management. The form of the oath prescribed in section 31 of the state revenue law above set out, for persons making a property return for taxation, includes property owned by the affiant on the first day of August, *and such as he had under his charge and management* on that day; and by section 28 above stated, the assessor is required to list for taxation "all taxable property owned by such person, *or under the care, charge or management of such person*," etc. The property in question was located in the city of St. Louis, and enjoyed the protection afforded to all property by the state and local governments. It was protected by the police and fire departments of the city, and it reaped its proportionate share of the advantages accruing to all property from the maintenance of law and order, and I submit, it should contribute rateably with other property towards defraying the cost of maintaining the same.

Nothing contained in the legislation of the United States militates against this view. In *Adams vs. Nashville*, 95 *U. S.*, 19, this court held that the provisions of the national banking act touching the taxation of the national banks by the states were not intended to curtail the power of the states on the subject of taxation. Under the acts of congress, organizing the national banks, the real property of a national banking association and the shares of stock therein in the hands of shareholders, are subject to state, county and municipal taxation. *Section* 5,219, *U. S. Rev. Stat.; Van Allen vs. The Assessor*, 3 *Wall.*, 573; *People vs. Commissioners*, 4 *Wall.*, 244. And the rule is that the shares must be assessed for taxation at their actual value. *People vs. Commissioners of Taxes, etc.*, 94 *U. S.*, 415. The value placed on the shares under this rule, includes the value of such personal property as is possessed by the bank. The intention of congress was not to exempt the banks from taxa-

tion, but to forbid the state and local governments from imposing any heavier burdens on them in that direction, than are borne by other property subject to state taxation. This view is announced in *Adams vs. Nashville*, and other cases above cited. The method of taxing the shares of all banking institutions in Missouri, including national banks, is specified in section 35 of the revenue law, and is not open to any objection. The assessment against the personal property in the receiver's possession in question here corresponds with the assessment that is made under the law of Missouri against the property of an insolvent state bank held by an assignee. The National Bank of the State of Missouri is subjected to the same treatment that a state bank undergoes under like circumstances.

Section 5,219 of the general statutes of the United States does not operate to exempt the personal property of an insolvent national bank in the hands of a receiver, from state and local taxation at the place where said property is held. The provision requiring local taxes to be assessed against the shares of stock, only applies to a bank. When a national bank closes its doors and ceases to prosecute a banking business and is declared insolvent by the comptroller of the currency and its property is vested in a receiver and its shares of stock possess no value, as was the case with the National Bank of the State of Missouri on June 19, 1877, it is no longer a bank. The rule established by congress for assessing the shares, has no further application. The property thereupon becomes subject to state taxation in the same manner that other personal property in the state is taxed.

2. If the above position is well taken it remains to inquire whether the case is within the equity jurisdiction of the United States. No action at law is given by the revenue law of Missouri to the collector on a personal

tax bill. The only remedy created by the statute is the power conferred on the collector to seize and sell the goods and chattels of the person liable for taxes pursuant to the following section:

"SEC. 118. The collectors shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattles are or may be required to be seized and sold under execution issued on judgment at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property;" etc. *Laws of Mo.* 1877, *p.* 381.

"SEC. 119. Whenever taxes shall be collected by seizure or sale of goods and chattels, in addition to the amount of tax and costs of failure to pay the collector, as provided by this act, the collector shall levy the necessary costs of the proceeding and the interest on the amount of the tax and costs of said failure for his trouble. If the collector have reason to believe that any person charged with taxes is about to remove from the county without paying his taxes, he may at any time levy such taxes, with costs and charges, by distress and sale: *Provided*, That in levying and selling personal property for taxes the collector shall be governed by the same rules and be entitled to the same fees as sheriffs are, or may be, for like services upon executions." *Laws of Mo.*, 1872, *p.* 107; *2 Wag. Mo. Stat.*, *p.* 1183.

The state, however, has an equitable lien for the payment of taxes, on the personal property of a debtor which will prevail over the claims of creditors and is not discharged by an assignment of the property for the benefit of creditors. *State vs. Rowse*, *49 Mo.*, *586*.

It appears from the allegations of the bill that the

payment of the tax bills in question has been duly demanded of the defendant and refused, and that said tax bills cannot be levied on the personal property in the custody of the receiver because he has converted said property into cash, and the money is now held by defendant in such a manner as to render it impossible to levy said tax bills thereon.

The receiver, it may be mentioned, is required by section 5234 of the United States revised statutes, to convert the real and personal property of the banking association into cash and pay over all moneys so realized to the treasurer of the United States subject to the order of the comptroller of the currency.

In the court below the defendant objected to this proceeding on the ground that the collection of taxes is not included in any branch of equity jurisprudence, and cited in support of the doctrine one case, *Durant vs. Supervisors*, 26 *Wend.*,66. An examination of the case will show that it is not authority to the extent claimed, that the decision was made by a bare majority of the court, and that among the dissenting members of the court was included the learned and able Judge Cowen.

The object of the bill in question here is not primarily the collection of a tax. It is maintained for the purpose of enforcing an equitable lien against the proceeds of property, which proceeds are alleged to be in the custody of the receiver. The defendant receiver occupies and hold his office and is connected with the controversy, under and by virtue of the national banking legislation of the United States. He is an officer of the United States. *Platt vs. Beach*, 2 *Benedict*, 303. The case is one arising under the constitution and laws of the United States. The questions whether and to what extent if at all, the personal property of an insolvent national bank in the possession of a receiver is subject to

state and local taxation at the place where said property is situated, are Federal questions. The national banks are the creatures of Federal legislation. They are created, exist and hold property pursuant to the acts of congress governing them. Congress has prescribed the manner in which the states may tax the banks. The defendant relies on section 5219 of the revised statutes of the United States, to exempt the personal property of the insolvent bank from state taxation. The question thus raised and presented is clearly within the jurisdiction of the United States courts. The complainant has no remedy at law. He is seeking to enforce an equitable lien. The enforcement of equitable liens is a well recognized ground of equity jurisdiction. *State vs. Duncan*, 67 *Tenn.* (3 *Lea*) 679, is a case where a bill in equity was filed to enforce a tax lien in favor of the state, the county of Davidson and the city of Nashville, and it was held that the chancery court had inherent jurisdiction to enforce the lien. I respectfully submit that the case here presented is clearly within the equity jurisdiction of the United States.

It was suggested by defendant's counsel in the court below, that the court possessed no such authority over the defendant as it was asked to exercise in this case; that the defendant was not an officer of the court and was merely the agent of the comptroller of the currency. The objection is an unusual one. If the court has jurisdiction of the case and of the parties, the power of the court to act in the premises is ample and complete. The defendant is amenable to the law as it is administered by the courts. The controversy here is to be settled by the courts. The question whether this property is subject to state taxation, is properly referred to the courts, and the judgment thereon will undoubtedly be observed by the defendant receiver and the comptroller of the currency.

The complainant is not required to prove his claim to the satisfaction of the comptroller, before appealing to the court for relief.

It was also claimed for the defendant, that section 723 of the U. S. statutes which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law," ousted the court of jurisdiction because by the Missouri statutes a plain, adequate and complete remedy by distraint was provided. The answer to this is that it is shown by the allegations of the bill, that the property and proceeds thereof have been and are held by the receiver in such manner that it was and is impossible for the collector to levy the tax bill on the property or its proceeds.

It was also said that the state statute having given a remedy, it must be followed to the exclusion of all other forms of procedure. The point is not well taken because the fundamental idea underlying this case is that the state has an equitable lien for its taxes enforceable against the property and its proceeds.

It was also urged that the decree asked by complainant involved a violation of an express duty imposed on the receiver by section 6234 of the U. S. statutes. The section mentioned provides that the receiver shall sell the real and personal property of the insolvent bank, and pay the moneys received to the treasurer of the United States, subject to the order of the comptroller. Clearly it was not the intention of congress by the above enactment, to prevent the states from collecting taxes legally assessed against property sold by the receiver.

The case is an important one, and I respectfully submit that the judgment below dismissing the bill should be reversed.

LEVERETT BELL,
of Counsel for Appellant.

IN THE

Supreme Court of the United States.

No. 667.

M. A. ROSENBLATT, COLLECTOR, &c., *Appellant*,

vs.

WALTER S. JOHNSTON, RECEIVER, &c., *Respondent*.

BRIEF OF RESPONDENT.

J. M. & C. H. KRUM,

For Respondent.

LEVISON & PAYNE STATIONERY CO., ST. LOUIS.

IN THE

Supreme Court of the United States.

M. A. ROSENBLATT, COLLECTOR OF THE CITY OF ST. LOUIS, *Appellant*,

vs.

WALTER S. JOHNSTON, RECEIVER OF THE NATIONAL BANK, STATE OF MISSOURI, - - *Respondent*.

No. 667.

BRIEF OF RESPONDENT.

This was a proceeding to obtain from the lower Court an order upon the Receiver of the National Bank of the State of Missouri, to pay to the city of St. Louis taxes assessed for the years 1877 and 1878, against assets of the bank in the hands of the Receiver.

The amended bill set forth the authority to sue and the official relation of the complainant. It alleged that the bank carried on business under the National Banking laws until June 19, 1877, when, upon its suspension and insolvency, the respondent was appointed Receiver by the Comptroller of the Currency. It alleged that, "*upon the happening of the insolvency of the National Bank of the State of Missouri as aforesaid, the shares of stock*

in said banking association became, and ever since have been and are now, absolutely worthless and of no value whatsoever."

The farther allegation was made that the assets and personal property of the banking association passed into the hands of the respondent as Receiver, and had been held by him since June, 1877, and disposed of in the settlement of the affairs of the bank. The assessment of taxes for the years 1877 and 1878 was averred, and the property in the hands of the Receiver was alleged to be sufficient to pay such taxes. The bill prayed an order on the respondent to pay the taxes out of the funds in his hands, and for general relief. To this bill the respondent demurred.

We respectfully submit that the bill stated no ground upon which the Court could lawfully order the respondent to pay the taxes sued for out of funds in his hands.

I.

The Court had no such authority over the respondent as the appellant would have had it exercise.

1. The respondent is not an officer of that Court. He was appointed by the Comptroller of the Currency, and is merely the agent of the Comptroller.

In the case of the *Ocean National Bank* against *Carll*, the action was begun by the bank in December, 1870, and was continued in the name of the bank until December 24, 1874, when the complaint was dismissed, and judgment for costs entered against the plaintiff. On December 15, 1871, Theodore M. Davis was appointed by the Comptroller of the Currency Receiver of the bank. Under that appointment he took possession of the assets of the bank, and had in his hands money sufficient to pay the judgment. He was requested by the defendant's attorney to pay the judgment. This he refused to do. Thereupon the defendant moved the Court in which the action had been brought, to order the defendant to pay the judgment out of assets of the bank in his hands. This motion was overruled on the ground that the Receiver was not under the control of the Court as its officer, but was merely an agent of the Comptroller of the Currency.

Ocean National Bank v. *Carll*, 7 Hun., 237.

2. Courts of equity do not make orders or decrees which involve a violation of express duty on the part of those against whom they are addressed.

Section 5234, Revised Statutes, provides:

"On being satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a Receiver, and require of him such bond and security as he deems proper. Such Receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description, of such association, collect all debts, dues and claims belonging to it, and, upon the order of a Court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. *Such Receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.*"

This section declares the duty of the Receiver. He cannot pay moneys into Courts or upon *orders* of Courts. And a Court of equity will hardly command that to be done which the statute forbids. If the complainant had a valid demand, he ought to have proved the same to the satisfaction of the Comptroller, or enforced the same under the statutes of the State.

II.

The Court below had no jurisdiction.

1. The collection of taxes is not included in any branch of equity jurisprudence. When a fund is in the hands of the Court, it may in some cases order that proper taxes be paid out of the fund. But there is no precedent for a *decree* commanding the payment of taxes.

Durant v. *Supervisors*, 26 Wend., 66.

2. The exercise, by the lower Court, of jurisdiction in equity, as prayed by complainant, is expressly forbidden by the laws of the United States. Sect. 723, Revised Statutes, provides that "suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." The statutes of Missouri, sect. 6754, provide a plain, adequate and complete remedy—namely, distraint.

3. The statute having given the remedy, it must be followed to the exclusion of all other forms of procedure.

"The levying of taxes is a matter solely of statutory creation, and no means can be resorted to to coerce their payment other than those pointed out in the statute. A tax, in its essential characteristics, is not a debt, but is an impost levied by Government or its citizens to support the State. A municipal corporation cannot provide for the collection of taxes by *suit* against the tax-payer, unless the power is specifically delegated by its charter."

Carondelet v. *Picot*, 38 Mo. 130.
Lane Co. v. *Oregon*, 7 Wall. 80.

The city of St. Louis has no such provision in its charter, and the Statutes of Missouri, sect. 6754, point out the means by which the complainant, the Collector of said city, must proceed to coerce the payment of taxes—namely, by seizure and sale of the goods and chattels of the person liable for taxes.

"Where no remedy is especially provided, a remedy by suit may be fairly implied. But where one is given which does not embrace an action, a tax, in general, cannot be recovered as a debt."

Camden v. *Allen*, 2 Dutch., 398.
Shaw v. *Pickett*, 26 Vt., 486.

In Massachusetts, a statute provided that no demand should be set off, unless it was founded upon a judgment or upon a contract. Otis Pierce sued the city of Boston to recover a sum due for his services as a teacher in one of the public schools of the city. To this demand the defendant sought to set off certain taxes, on the theory that the assessment of the taxes was equivalent to a judgment. The set-off was rejected. The Court say:

"Taxes are those proportional and reasonable assessments and duties which may, by virtue of the Constitution, be imposed from time to time by the General Court upon the inhabitants of the Commonwealth for the necessary defense and support of the Government, and for the protection and preservation of the rights and to promote the interests of the people. They do not partake of the nature of judgments. The imposition and collection of them are ministerial acts, and are the proper subjects of inquiry, as to the manner of their assessment and the mode of their enforcement, in the judicial forum; and *for the collection of them no right of action is given* (with a few special exceptions, growing out of the death of parties, or their removal out of the Collector's precinct, or on the marriage of females), nor can they be turned into judgments."

Pierce v. *City of Boston*, 3 Metc., 520.

As has been before indicated, the statute of Missouri prescribes the remedy by which the collection of taxes on personal estate can be enforced. It must be followed. No other remedy is open to the Collector.

"The Collectors shall diligently endeavor, and use all lawful means, to collect all taxes which they are required to collect in their respective counties, and to that end they shall have power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgment at law, and no property whatever shall be exempt from seizure and sale for taxes due on land or personal property.

Rev. Stat. Mo., 1824, sect. 6754.

Again—

"The cashier, secretary, or chief clerk of any corporation, the shares of which are taxable by law, at the request of the Collector, shall give him a certificate under his hand, showing the number and amount of shares held in the stock of such corporation, the names of the holders, and the incumbrances thereon; and such Collector, in default of the payment by the corporation of the taxes due thereon, as required by this chapter, shall seize and sell the same in the manner prescribed in this chapter, and the purchasers thereof shall be admitted to all the rights, powers and privileges that the holders of such shares had at the time of seizing the same, and shall be entered by such corporation on their books as the owners of such shares."

Rev. Stat. Mo., 1325, sect. 6756.

In *Alexander* v. *Helber*, 35 Mo., 334, damages were sought to be recovered for the illegal seizure and sale of a slave. The defendant sought to justify on the ground that he was Collector of Taxes of the town of Farmington, and seized the slave as the means of collecting a tax which the plaintiff owed the town. He defended under an ordinance which required the Collector to seize and sell personal property of those who failed or refused to pay their taxes. The act of the General Assembly gave

to the town the power to levy and collect taxes; and another section of the law provided that, "if any person fail to pay any tax levied on his real or personal property, the town Collector may recover the same by civil action in the name of the corporation before any Court of competent jurisdiction." In view of this provision, the Supreme Court of Missouri say:

"It is unnecessary to inquire nicely as to the means for enforcing the collection which the town could employ under the general power granted to it 'to levy and collect taxes,' because the provision for the collection by means of a civil action having been made, other modes of enforcing the payment of taxes are thereby excluded and forbidden."

"The right to levy and collect taxes in the case before the Court is given by statute, without which it would not exist. The remedy or manner of enforcing that right is also prescribed by statute. Upon the general principle, therefore, supposed already to be established, if the complainants claim the right of the statute, they can only pursue the remedy of the statute. If that remedy be insufficient to give full effect to the right, the Legislature, and not the Court of Chancery, must supply the defect."

See, also, *Durant* v. *Supervisors*, 26 Wend., 66, 107.

The doctrine here asserted has been fully approved by this Court in *Savings Bank* v. *United States*, 19 Wall., 227. The United States brought an action of debt to recover taxes assessed under the Internal Revenue laws. The act of July 13, 1866, having provided a remedy other than an action of debt, it was argued against the jurisdiction that the United States had no common law; that the laws of the several States were the rules of decision in the trial of actions at common law; that the act of Congress under which the taxes were assessed provided a special remedy for their collection, and that it was a principle of the common law of Pennsylvania that when

a statute created a right, and provided a particular remedy by which to enforce that right, no other remedy than that afforded by the statute could be used. This Court admitted the full force of this argument.

"The reason of the rule is, that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule therefore rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other."

But the Court held that the United States were exempt from the prohibition of the statute, because they were not named in the statute.

"The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the Government. They may be obligatory upon tax-collectors. They may prevent any suit at law by such officers or agents."

But the United States were not bound, because they were not named in the statute. On this ground, and the further ground that the act of July 13, 1866, gave *express authority* to sue at law to recover taxes in favor of the United States, the action was sustained. But it is manifest that, had the Internal Revenue law been as limited in its provisions as the laws of Missouri, the jurisdiction to maintain an action at law would have been denied.

III.

The taxes sued for were not legally assessed, and could not be enforced by any process.

The averment of the amended bill in regard to the taxes for the year was as follows:

"That said *personal property* so in the possession of said Johnston, Receiver as aforesaid, was, on the first day of August, 1877, pursuant to and in accordance with the general revenue law of Missouri, entitled 'An act concerning the assessment and collection of the revenue,' approved March 30, 1872, and the amendments thereto, assessed by the proper officers at the valuation of 1,600,000 dollars for the taxes of 1878, being the year commencing August 1, 1877, and the taxes due thereon according to law were duly levied and assessed on said valuation, and amounted in the aggregate for said year to 41,600 dollars, of which 6,400 dollars were for State purposes, 7,200 dollars for the support of schools, and 28,000 dollars for the municipal purposes of the city of St. Louis."

The bill contains a similar averment in regard to the taxes for the year 1879.

The taxes sued for were therefore levied upon personal property—assets of the insolvent banking association. The taxes were not levied on the shares of stock owned by the respective stockholders. They were levied on personal property of the association. It is therefore manifest that the assessment of taxes was without warrant of law.

Section 5214, Revised Statutes of the United States, provides that, "In lieu of *all* existing taxes, every association shall pay to the Treasurer of the United States" certain duties upon its circulation, deposits, and capital stock not invested in United States bonds. And section 5219 further provides, "That nothing in this act shall be construed to prevent all the *shares* of said association held by any

person or body corporate from being included in the valuation of the personal property of such person or corporation, in the assessmentof taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of such State." * * * "Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

"From the payment of what taxes does this act exempt these associations? The language of the act replies in explicit terms, from '*all existing taxes.*' The terms include *all State, county, or municipal taxes.* * * * The *shares* of the bank, and not estate owned by it, are excepted from this exemption by express words, and the State is permitted to tax such property. The express grant of the power to tax specific property is conclusive evidence of the intention to withhold the power to tax other property. * * * We conclude, therefore, that no revenue can be collected by a State, county, or municipality from banks organized under this act, except by assessment upon their shares and real estate."

National Bank of Oskaloosa v. *Young*, 25 Iowa, 312.

There is a long line of decisions of this Court and the Circuit Courts of the United States, commencing with *Van Allen* v. *The Assessors*, 3 Wall., 573, and extending down to *People* v. *Weaver*, 10 Otto, 541, wherein it has been uniformly held as stated by Mr. Justice Miller in the last-mentioned case:

"That the provision which we have cited was necessary to authorize States to impose *any tax whatever* on these bank shares, is abundantly established by the cases of *McCulloch* v. *State of Maryland*, 4 Wheat 316; *Osborn* v. *Bank of the United States*, 9 id. 739; *Weston* v. *City Council of Charleston*, 2 Pet. 449."

By these decisions, furthermore, the States were forced to repeal their statutes taxing banks on their *capital*, because if State banks were taxed on capital, from which they had the right to deduct their United States bonds not taxable, national banks, taxable only on the value of their *shares*, became thereby discriminated against, paying more than other moneyed capital in the State; and these decisions, therefore, all hold such laws to be void and inoperative against national banks.

When the case of *National Bank of Oskaloosa* v. *Young*, just cited, was decided, Iowa had not conformed her statutes to the decisions of the Supreme Court of the United States, as most, if not all, of the States had, by thereafter taxing all banking corporations on the *value of their shares;* hence the Assessors, unable to tax the *shares*, having no statute to that effect, and unable to tax the capital stock, as being a void law against national banks — as decided by the same Court in *Hubbard* v. *The Supervisors of Johnson County*, 23 Iowa, 130 — undertook to assess precisely what this complainant is trying to collect taxes on, namely (to quote the Court), on "the safes, office furniture, cash on hand and due from other banks, bills discounted, etc., etc., which make up what are called *assets*."

The Court, as already quoted, decided that the "assets" of a national bank could not be taxed *eo nomine*, but only the value of the shares and real estate.

The Missouri Statute, section 6692, provides: "Persons owning shares of stock in banks or any joint-stock institution or association doing a banking business, or any insurance company, whether of fire, marine, life, health, accident, or other insurance, incorporated under or by

any law of the United States or of this State, are not required to deliver to the Assessor a list thereof; but the President or other chief officers of such corporations shall, under oath, deliver to the Assessor a list of all shares of stock held therein, and the names of the persons who hold the same, and shall also state the actual *cash value of such stock* and all the property belonging to such corporations. In estimating the value of such stock and property, the officer making the same shall estimate and include all reserve funds, undivided profits, premiums or earnings, and all other values belonging to such corporations, which cash value shall be assessed and taxed as other personal property. Insurance companies, or any other corporations doing business on the mutual plan without capital stock, shall make like returns of the net value of all assets or values belonging thereto, which net value shall be assessed and taxed in like manner. Private bankers, brokers, money brokers, and exchange dealers shall in like manner make return of all moneys or values of any description invested in or used in their business, which shall be taxed as other personal property."

In commenting on this section, Judge Dillon, in *St. Louis National Bank* v. *Papin*, 4 Dillon, 29, says:

"It is probably a sound view of Federal legislation as it stands that Congress has limited the States to taxation upon the *shares* of national banks, as distinguished from taxation of the banks *eo nomine* upon their property or capital."

And further:

"It does not seem to us that the act excluded from the consideration of the Assessor the *liabilities* of the bank, since these *must* be taken into account if the 'actual cash value' of the stock, and no more, is to be ascertained and taxed. This view is confirmed by the

next sentence, which requires corporations on the mutual plan 'to make like returns of the net value,' which would allow *liabilities* to be regarded in ascertaining the value of the assets to be taxed."

The bill itself in this case shows that the liabilities of the National Bank of the State of Missouri exceed the value of its assets, because it alleges that "the shares of stock of said bank became, and ever since have been, and are now, absolutely worthless and of no value whatever." That is to say, the bank owes more than the value of its assets. Having no net value of stock to tax, the right comes to an end against the bank, which cannot be otherwise taxed than in accordance with the strict terms of the concession by Congress, and the Missouri statute passed to accord therewith.

But the argument for the bill may be that the National Bank of the State of Missouri has ceased to exist, and that the assets have vested in the Receiver, and should be taxed in his hands as a trustee, without any deduction for the liabilities of the bank.

The mere insolvency of a national banking association, and the appointment of a Receiver, do not work a dissolution of such association. There is no allegation in the bill that the association has been dissolved under appropriate proceedings instituted by the Comptroller for violations of the national banking laws.

"Beyond doubt, the appointment of a Receiver supersedes the power of the Directors to exercise the incidental powers necessary to carry on the business of banking, as the Receiver is required to take possession of the books, records and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking; but the corporate franchise of the association is not dissolved, and the association as a legal entity continues to exist, as is shown to a demonstration by the fact that it

is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owner."

Bank of Bethel v. *Pahquioque Bank*, 14 Wall., 383.

"We think the rule laid down in the Connecticut case (*Bank of Bethel* v. *Pahquioque Bank*) is the law, and hold that the corporation is not absolutely dissolved."

Green v. *The Walkill Bank*, 7 Hun, 63.

"The bank continued to exist, notwithstanding the appointment of the Receiver. The suit was, therefore, properly instituted against it, and the defense should accordingly be made by it."

Security Bank of New York v. *National Bank of the Commonwealth*, 4 Thomp. & C., 518.

"We have already decided in the case of this very Receiver, that he may bring suit in his own name or use the name of the association."

Bank v. *Kennedy*, 17 Wall., 19.

The Receiver merely supersedes the Board of Directors. No title to the assets vests in him by virtue of his appointment.

"It may be conceded, as was insisted in the argument, that there is nothing in the Act of Congress which declares that the assets of a bank vest in the Receiver, immediately from and after an act of insolvency, or that the appointment of the Receiver relates back to such act. Indeed, at no time does the property of those assets rest in the Receiver."

Venango National Bank v. *Taylor*, 56 Pa. St., 16.

Therefore, the banking association continued to exist after its suspension, and still exists.

Its property has passed into the hands of a Receiver, who has proceeded to realize upon it in the place of the association. The character of the property was not changed. It remained assets of a national banking

association. Its condition in regard to the power of taxation, at the hands of the State, remained unchanged. If the property *eo nomine* was exempt from taxation when it passed into the hands of the Receiver, it remained so exempt in course of his administration. The power of the State to tax national banking associations results from the National Bank Act. To the extent permitted by that act, the national banking associations are taxable, and no further. There is no authority given to tax the personal property of a national banking association. Hence the power to tax in this respect did not and does not exist on the part of the State.

This doctrine has been recently declared at the April term, 1880, of the Supreme Court of Missouri, in the case of *City of Carthage* v. *The First National Bank of Carthage*. Referring to *Van Allen* v. *The Assessors*, 3 Wall., 573, and other decisions of the Supreme Court of the United States, the Court say:

> "In all of these cases it has been held that a State can only impose such a tax upon these national banking corporations as is authorized in the act of Congress creating them, and that said act only authorizes a tax on the *shares* in such bank, and not upon its capital stock; that such banks derive their authority to do business in the State by virtue of the United States Statute, which is supreme."
>
> *City of Carthage* v. *National Bank*, 71 Mo., 508.

What of assets there are in the National Bank of the State of Missouri are the remains of the capital stock and deposits of the bank. As this decision just quoted says, and all those heretofore quoted say, capital stock, *eo nomine*, cannot be taxed in a national bank. Neither can deposits. There is no authority in the Missouri Statutes to tax the deposits of any bank against the bank.

In point of fact, the amount of deposits is always deducted from the gross amount of assets of the bank, as its liabilities, in order to arrive at the net value of the shares, the only thing taxable against the bank.

St. Louis National Bank v. *Papin, supra.*

The deposits in a bank are returned for taxation by the depositor.

Sect. 6664 of the Missouri Statutes provides: "The term '*credits*,' whenever used in this chapter, shall be held to mean and include every *deposit* which the person owning * * * is entitled to withdraw in money on demand, and every claim or demand for money * * * due or to become due." And sect. 6713 provides, "No person shall be required to list a greater portion of any *credits* than he believes will be received or can be collected." Wherefore it is plain that every creditor of the National Bank of the State of Missouri is required by law to list for taxation whatever that bank owes him on account of his deposit; and whatever the law requires to be done will be presumed by the Court to have been done, so far as this case is concerned.

"It has very properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the *express words* of the statute, or by necessary implication."

Cooley on Tax., p. 165.

"It is appropriate to review erroneous assessments. Taxation for public purposes is a conceded power of Government; but it must be enforced *strictly* according to law, or it becomes the most obnoxious means of confiscation. The rights of the citizen should be sedulously guarded and protected against the lawless imposition of burdens."

National Bank of Chemung v. *Elmira*, 53 N. Y., 49.

Verily, if the result sought for by this bill could be obtained in the lower Court or any other jurisdiction, equity would be, as John Selden said, "a roguish thing."

J. M. & C. H. KRUM,
For Respondent.

14,484

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 745.

CHARLES MURPHY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 25, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 745.

CHARLES MURPHY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims of the United States.

CHARLES MURPHY
vs.
THE UNITED STATES. } No. 11563.

Petition.—Filed March 19, 1877.

The petition of Charles Murphy, of Vallejo, county of Solano and State of California, respectfully represents:

That on the 18th day of July, 1873, he entered into a contract with John Rogers, rear-admiral in the United States Navy, and commandant of the navy-yard at Mare Island, California, representing the Navy Department of the United States, by which he, the said Murphy, undertook to do and perform certain work in excavating the earth at the United States navy-yard, at Mare Island, in the said State of California, for the purpose of constructing a dry-dock, and for which he, the said petitioner, was to be paid by the United States, as per said contract, at the rate of seventy-four cents per cubic yard of all the earth to be so removed, and $6.87½ for every lineal foot of tunneling. And the said contract was in all respects regularly and lawfully entered into, and was thereupon reduced to writing by the parties thereto, as required by the laws of the United States in all such cases, and signed by the said Charles Murphy, as principal, and Dwight Spencer, Nathan Coombs, and William Wilson Stillwagon, as sureties, parties of the first part, and the United States by John Rogers, rear-admiral in the United States Navy, and commandant of the navy-yard at
2 Mare Island, California, acting under authority of the Navy Department, and in its behalf, party of the second part; which written contract and printed specifications attached thereto are herewith filed, marked "Exhibit A," and made a part of this petition.

And the petitioner avers that within the period of ten days from and after signing of the contract as aforesaid, he, the petitioner, was ready and fully prepared to go to work in accordance with the terms of said contract, and was very anxious to do so, in order to complete it before the setting in of the rainy season, which usually commences there the latter part of the month of November.

And your petitioner further represents and claims that it was the duty of the officers of the government in charge of said works to put him in possession of all the ground necessary to carry on the work of excavating the site of said dry-dock clear of all obstructions, and to protect him, his laborers, work, animals, and property of all kinds, as also to assign a place to deposit the earth excavated, within a reasonable distance from the work, and in all respects to afford him every reasonable facility to carry on the work; and that if such provisions are not expressed in so many words in said written contract, they are a necessary implication for its faithful performance.

And your petitioner further represents that he had a right to carry on said excavations in any way he might deem the most expeditious and economical to comply with the terms of the contract, either by using picks, shovels, ploughs, or blasting with gunpowder.

And your petitioner further represents that the officers and agents of the government, as aforesaid, did not, when he was ready, or at any time thereafter, put him in possession of all the ground to be excavated so that he might have sufficient room to carry on the work to the

best advantage, so as to enable him to complete the work within
3 the time required by the contract, but he was limited to a small portion of the premises at a time, greatly to his disadvantage; nor was the pit in which the work had to be done kept free from the waters of the bay (of Napa, near which it was situated), as it should have been done by the government; nor was he allowed, after a time, to use gunpowder in blasting, although it was necessary, but was compelled, by the officers and agents in charge, to use picks in excavating, which was a much more tedious and expensive method; nor was he allowed, when removing the earth, to deposit or dump it at a place within a reasonable distance from the place of the excavation, although there was plenty of room to do so, but he was compelled to transport the same a long distance over marshy ground, and a great expense, and the plans of the forms of the excavation were changed to his great damage; and he was in like manner subjected to divers and various other charges, limitations, restrictions, exactions, obstructions, and difficulties, all of which subjected him to great loss in time and money, and greatly to his injury.

And your petitioner further represents that in consequence of the failure of the government officers and agents in charge as aforesaid to perform that which of right they should have done or have permitted to have been done under the contract, he was subjected to great and extraordinary trouble, expense, and loss of time, for which he, your petitioner, ought not, and of right cannot, be made chargeable, but which is justly chargeable against the defendants.

And your petitioner further represents that he was always and at all times anxious to fulfill his part of the contract, and exerted himself to the utmost to do so, even under the disadvantageous circumstances in which he was placed by the government authorities, and he continued the work as best he could under the unjust exactions, limitations, and restrictions imposed on him by those in authority, because he had invested a very large sum of money in machinery, horses, mules,
4 oxen, implements, and other things necessary to carry on the work, much of which property was of little value to him for any other purpose, and it could be sold only at a great reduction on its real value and on what he had paid for it.

And your petitioner further represents that he did perform a great deal of work on the premises, commencing, under and by virtue of said contract, on or about the 22d day of July, 1873, and continuing, under the circumstances above set forth, until on or about the 5th day of September, 1874, when it was formally annulled by the defendants. During this period of time this petitioner had excavated and removed from the site of the said dry-dock, as hereinbefore described, (62,907) sixty-two thousand nine hundred and seven cubic yards of earth from the body of earth originally intended to be taken out, according to the measurement of the United States assistant engineer in charge.

And your petitioner further avers and represents that, in the prosecution of the work, he was compelled to remove about (15,000) fifteen thousand cubic yards of earth in addition to the foregoing, made necessary by the severity of the winter rains saturating the banks, by the swelling of the bottom of the pit, which displaced the beams used for shoring, and by the undermining of the banks by orders of the authorities, all of which caused large bodies of earth to slide into the pit, but which was from no fault of this petitioner.

And your petitioner further represents that, in consequence of these aforementioned acts, and others, of the government authorities afore-

said, against which he protested at the time, his credit was greatly injured, and his property was levied on by the sheriff of the county, and sold at ruinous prices to satisfy debts incurred by this petitioner in the purchase of materials and in the employment of laborers to carry on the work.

5 Wherefore your petitioner respectfully represents that in view of the premises he claims that he was and is justly entitled to compensation from the Government of the United States as follows, to wit:

For excavating 62,907 cubic yards, at 74c. per yd	$46,551
For excavating 15,000 cubic yards, at 74c. per yd., of slides	11,100
For constructing dam	350
For extra labor and expense by being prohibited the use of gunpowder in blasting	17,848
For difference in place of dumping earth from pit	6,500
For filling north wing of dam	350
For extra expense in extending head of pit	1,500
For delays by government to exclude tide-water, in limiting place of working to less than whole site, and other obstructions	20,000
For damages, loss of time, expenses, and for losses on property, as above	45,000
Total	$149,199

Amounting in all to one hundred and forty-nine thousand one hundred and ninety-nine dollars.

And your petitioner further represents that upon application to the proper authorities of the United States Government he was by them paid (after long and unnecessary delays, imposing on him heavy expenses), on account, as follows, to wit:

For excavating 62,907 cubic yards, at 74c. per yd	$46,551
For excavating 9,493 cubic yards, at 74c. per yd., slides	7,024
For constructing dam	350
For extra transportation of earth to place of dumping	2,835
For injuries to railroad track at place of dumping	500
For neglect to build dam to keep out tide-water	2,000
Total paid	$59,260

6 Making a total of fifty-nine thousand two hundred and sixty dollars paid on account; and, though often requested by your petitioner to do so, the defendants have wrongfully refused and neglected to pay him the balance on said account, to his great damage and injury; wherefore he sues and prays judgment therefor in the amount of eighty-nine thousand nine hundred and thirty-nine dollars, as hereinbefore set forth, and for such other and further relief as to this honorable court may seem just and proper.

CHARLES MURPHY.

Charles Murphy, being duly sworn, deposeth and saith that he is the claimant named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein has been made; that he is justly entitled to the amounts therein as claimed from the United States after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

CHARLES MURPHY.

Sworn and subscribed before me, at the city and county of Washington, District of Columbia, this nineteenth day of March, A. D. 1877.

[SEAL.] N. CALLAN,
Notary Public.

Claimant's post-office address is Charles Murphy, Vallejo, Solano County, California.

Claimant's attorney is James W. Denver, Washington, D. C.

7 EXHIBIT A.

This contract made and entered into this 18th day of July, one thousand eight hundred and seventy-three, between Charles Murphy, of Vallejo, county of Solano and State of California, as principal, and Dwight Spencer, Nathan Coombs, and William W. Stellwagon, all of Napa, county of Napa, and State aforesaid, as sureties, parties of the first part, and the United States, by John Rodgers, rear admiral in the United States Navy, and commandant at the navy-yard at Mare Island, California, acting under the authority of the Navy Department, and in its behalf, party of the second part—

Witnesseth: That the said parties of the first part do hereby contract and engage with the said United States as follows, viz: That in consideration of the payments hereinafter mentioned, the said parties of the first part agree to furnish at their own cost and expense all the labor, materials, teams, provender, implements, and tools of every description required, and within ten days from the signing and execution of this contract to undertake, with a force of not less than ten horses and carts (with the required workmen), or an equivalent thereto, the work of excavating, tunnelling, and shoring on the site of the stone dry-dock now in course of building in the said navy-yard, the said work to be vigorously carried on and completed according to the accompanying specifications which form a part of this contract, and to the drawings of the said dry-dock, as they may be furnished from time to time by the superintendent thereof, and the said parties of the first part do agree to perform all the said work in a perfectly secure and workmanlike manner, and according to the nature and requirements of the dry-dock works that are hereafter intended to be constructed on said site and in the excavation to be made, to the satisfaction and approval of the commandant of the navy-yard, and in accordance with the said specifications and drawings as aforesaid, and all things incident thereto, which may become necessary according to the intent and meaning thereof, although not specifically stated or described by (but which may be inferred from) the said specifications and drawings, the same generally to illustrate each other. And should it appear that any of the works hereby intended to be done, or matters relative thereto, are not fully detailed or explained in the said specifications or drawings, the said parties of the first part shall apply to the superintendent of the dry-dock works for such further detailed explanation, and perform his orders as part of the contract.

8

In case of delay by the said parties of the first part in providing and delivering the requisite materials, or in the advancement of the above-named works, or of a deficiency of workmen, as well in respect to dismissing any unskillful workman or workmen, or for misconduct, the commandant shall be at liberty, after a written notice of three days to the foreman or building agent, or to the aforesaid principal, to provide,

at the expense of said parties of the first part, all such materials and employ an increased number or such number of workmen, at such wages as the said commandant shall deem proper; and the costs and charges incurred shall be retained out of the contract amount, or balance thereof, which may remain due, or be recoverable as liquidated damages; the said party of the second part to be at liberty to make any deviation from or alteration in the plan, form, construction, detail, and execution described by the drawings and specifications, without invalidating or rendering void the contract.

The said parties of the first part, their foreman or building agent, upon receiving a written order from the superintendent for that purpose, shall suspend the working and proceeding with such part or portions of work, to be specified in such order, for the due and proper execution of other work or works connected therewith; and in case of inclemency of weather, and for the prevention, as far as possible, from the flow of rainfall or surface-water into the excavation, he shall cause suitable ditches to be cut for the purpose of leading such water away from the works.

The said parties of the first part further agree that all the excavation and tunneling of the said dry-dock site, with all the necessary shoring and timbering as aforesaid, shall be completed within one hundred and twenty (120) days from the date of this contract; and the said parties of the first part further agree that the said party of the second part shall be, and hereby is, authorized to deduct and retain, out of any money which may become due to the parties of the first part, the sum of one hundred ($100.00) dollars per day for each and every day, Sundays and holidays only excepted, that the said works may re-
9 main incomplete and unfinished beyond the time herein stipulated for its completion. And the said parties of the first part do further engage and contract that no member of Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. And it is hereby expressly provided, and this contract is upon this express condition, that if any person above named shall be admitted to any share or part of this contract, or to any benefit to arise under it, or in case the parties of the first part shall in any respect fail to perform this contract on their part, the same may be, at the option of the Navy Department, declared null and void, without affecting their right to recover for defaults which may have occurred.

And the party of the second part hereby contracts and agrees that, for the full and entire completion of this contract to the satisfaction of the party of the second part, there shall be paid to the parties of the first part by the party of the second part the sum of seventy-four cents, United States currency, for each and every cubic yard of materials excavated as aforesaid, and measured in the excavation, and six dollars and eighty-seven and one-half cents, United States currency, for each and every lineal foot of tunneling performed as aforesaid, the said sums to be paid in the following manner; that is to say, when, in the opinion of the engineer of the dry-dock, one-fourth of the work is satisfactorily completed, he shall cause the same to be measured, and give his certificate for the number of cubic yards excavated, and the extent of tunneling performed, upon which certificate triplicate approved bills upon the Navy pay office at San Francisco shall be made for the said one-fourth and eighty per centum of the amount of said bills shall be paid by the disbursing paymaster within thirty days, the remaining twenty

per centum being withheld from the amount of all payments due on account of this contract, and not in any event to be paid, except specially authorized by the Secretary of the Navy, until this contract shall be in all respects complied with by the parties of the first part. In like manner, on the completion of one-half, three-quarters, and the whole of the entire excavation, tunneling, shoring, etc., bills shall be made and payable, respectively, for the amounts of work performed.

10 It is further understood and agreed that in case the said parties of the first part shall fail to perform all or any of the covenants herein provided to be performed on their part, the Navy Department shall have the power to annul this contract without loss or damage to the government, and in case of failure aforesaid, or in completing the said work at the time specified, the said department shall have power to enter upon and complete the said work at the expense of the said parties of the first part.

CHARLES MURPHY.
DWIGHT SPENCER.
NATHAN COOMBS.
WILLIAM WILSON STILLWAGON.
JOHN RODGERS,
Rear Adm'l U. S. N., and Com'd't Navy Yard.

JAMES DONNELLY.

UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 5TH DISTRICT, CALIFORNA,
Napa City, July 16th, 1873.

I hereby certify that by the records of my office, and from personal knowledge, the sureties to the within contract, in default of the performance of the obligations by the principal, are, by pecuniary ability, fully able to perform the requirements of the same.

[SEAL.] (Signed) W. C. S. SMITH,
Collector 5th Dist., California.

Specification for excavating the site of the dry-dock, now being constructed at the navy-yard, Mare Island, California, and general conditions on which the work is to be executed.

1. The whole of the ground within the limits of the proposed dock and as may be necessary for its working space, roads, etc., must be taken out to the required widths and depths as may be directed by the civil engineer in charge, and in the order to be prescribed by him.

2. The bottom of the trenches or cuttings must be carefully leveled and formed to receive the masonry or whatever work may be required to be placed therein. All roadways or approaches, and all spaces or areas to be left around the dock and which may require to be ex-
11 cavated under this contract, must be carefully graded to such grades as the superintending engineer may direct.

3. The sides of the excavation must be shored and timbered in such manner as the contractor may think right, and on his own responsibility, or slopes may be formed for reducing the quantity of timber-shoring and side-planking, but the excavation to the widths and depths shown on the drawing, or as may be required by the masonry of the dock, will only be paid for.

4. The sufficiency of the shoring, timbering, and of all the means em-

ployed by the contractor for excavation the earth-work must rest with him, and he must take all the responsibility of all failures from whatever cause arising, immediately remedying them at his own cost.

5. The soil excavated or dredged from the site of the work must be removed and deposited at such point or points on the navy-yard as may be directed by the superintending engineer, and in such manner and order, and at such grades, as he may prescribe. The contractor is to reserve such excavated material as the superintending engineer shall deem suitable for puddling and filling the coffer-dam, and shall deposit the same therein, carefully preparing the said material for this portion of the work and placing it in the dam as he may be directed. In like manner he shall reserve suitable material for the embankment within the enclosure of the coffer-dam, and deposit the same as he may be directed by the superintending engineer.

6. In case tunneling shall be required for the drainage culverts of the dock, the contractor is to perform the same according to the forms and dimensions as laid down on the drawings, and so as to admit of the proper construction of the masonry of said culverts. Wherever necessary he is to provide suitable materials and perform all the work required for timbering or shoring said tunnels. The excavated materials from the tunnels is to be disposed of in the same general manner as prescribed for the above-mentioned portions of the dock.

7. All timber, clay, and other materials used by the contractor for dams and other temporary purposes connected with the excavation and the tunneling must be removed by him at his own cost and charge, but
no shoring or timbering necessary to sustain the banks or tun-
12 nels shall be removed by him without written authority from the
superintending engineer of the work.

8. The expense of dams, ditches, and the means of leading water to the draining wells must be borne by the contractor, as far as the draining of his own work is concerned, but the government is to provide and maintain the operation of all pumping machinery necessary for the drainage of the work, at its own cost and expense.

9. All the labor, materials, teams, provender, implements, and tools of every description necessary for the excavation and tunneling of the said work, and shoring and timbering the same, including all the necessary means for removing, depositing, and grading the excavated materials, excepting the pumping machinery and its maintenance, as aforesaid, are to be provided by the contractor at his own cost and charge.

10. The excavation will be paid for at the stipulated contract price per cubic yard measured in the cuts, and will include all removal, depositing, filling, and grading of the materials, and all work connected therewith. The tunneling, including all shoring, timbering and removal of material, filling and grading with the same, will be paid for at the stipulated contract price per lineal foot.

The above is subject to any changes that may be made by the Bureau of Yards and Docks, before the award of contract.

13 *Traverse.—Filed March 23d*, 1877.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of

eighty-nine thousand nine hundred and thirty-nine dollars says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

14 *Findings of fact.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Prior to the 18th of July, 1873, the defendants commenced excavations for a dry-dock, at Mare Island, in California. The excavation was to be about 500 feet long, about 150 feet wide, and about 36 feet deep. About two-thirds of it was to be in solid ground and the remainder below high-water mark. The head of the dock (or west end) was to be in the solid ground, and semi-circular, with a radius of 52 feet on the inside of the masonry. The defendants made their said excavation in the western portion in an irregular manner, not going out fully to the lines of the intended masonry as finally established. Before the said 18th day of July the said excavations made by the defendants amounted to 18,900 yards.

II. It was impossible to make the excavations for said proposed dry-dock on the eastern part, which the tide covered, until a dam should be constructed to keep the water out. The defendants planned a coffer-dam, which was suitable for the purpose, and commenced erecting it prior to the said 18th day of July. The outer part of the dam was to be outside of low-water mark, and was to run in a line substantially parallel to the coast line. It was to consist of three close rows of square wooden piles, to be braced by four double-armed buttresses on the inner wall. This front wall was to be connected with the shore by wings at right angles, each wing to be constructed for a portion of the way of similar piling in three rows, but nearer the shore the work on the wings was to be diminished to two rows of lighter piling. The pile-work was to be firmly anchored together with iron, and the whole spaces between the rows was to be filled up with clay puddling, which it was proposed to take mainly from the pit to be excavated.

III. On the said 18th day of July, 1873, the defendants had driven into place about 1,300 piles in the said dam, and had filled in between the piles a large portion of the material so excavated by them. There then remained about 120 more piles to drive. The puddling which had been put in was not sufficient to keep the water out, and the tide at that time flowed in and out between the piles over about half of
15 the site of the proposed excavation. Before the water could be pumped out it was necessary that the remaining piles should be put in place and that all the puddling should be put in and packed between the rows of piles in order to exclude the tide. This condition of the work was known to the claimant on that day.

IV. On or about the 14th June, 1873, the defendants advertised for sealed proposals for excavating the said dry-dock. The following is a copy of said advertisement:

"NAVY YARD, MARE ISLAND,
"*June* 14, 1873.

"Sealed proposals, indorsed 'Proposals for excavating dry-dock,' will be received at the commandant's office until 12 o'clock noon of Tuesday, the first day of July, 1873, for the excavation of about 90,000 cubic yards of material from the site of the dry-dock of said yard.

"The contractor is to furnish all necessary teams, carts, tools, labor, materials, and everything necessary for excavating and shoring the pit for the said dry-dock. He is to execute the work in such order and manner and deposit the earth excavated at such point or points on the island as may be directed by the civil engineer in charge of the work. It is possible that in the progress of the work it may become advisable to tunnel for the draining culverts. To meet this contingency, bidders are requested to name a price per lineal foot for which they will engage to perform the excavation and timbering for the tunnels. The area of the section of the tunnels will be about 101 and 51 square feet.

"The cost of drainage while the excavation is in progress will be bourne by the government.

"No bid will be received from any parties except such as are known to be in business and are considered to be responsible, prompt, and reliable, and of whose responsibility the commandant shall be the judge, and who can give satisfactory evidence of their ability to perform the work faithfully and expeditiously.

"The government reserves the right to reject any and all offers, and no payment will be made until one-fourth of the work is performed, and the remaining payments when one-half, three-quarters, and the whole work are respectively completed. Payments of 80 per centum of the amount due will be made, and 20 per centum of each bill be retained until the whole work is completed.

"Bidders are requested to name the time in which they will engage to complete the work, and their offers must be accompanied with the certificate of two guarantors, who will become responsible each in the sum of $20,000 for the execution of the work if awarded to the said bidders. The certificate to the said guaranto's' responsibility must be certified to by the collector of internal revenue for the district in which they reside.

"No portion of the above-described work will be allowed to be sublet by the contractor without especial authority from the Navy Department.

"Further information will be furnished on application at the commandant's office, at the navy-yard, Mare Island.

"(Signed) "THOMAS O. SELFRIDGE,
"*Commandant.*"

A part of the "further information" so furnished to bidders was the result of a boring made on the proposed site in order to ascertain the character of the materials to be excavated.

V. The claimant bid in response to said advertisement, and his bid was accepted. On or about the said 18th day of July, 1873, the claimant & the defendants, in pursuance thereof, entered into the contract and accompanying specifications, of which copies are attached to the claimant's petition, entitled Exhibit A.

VI. In consequence of the said contract, the defendants discontinued their prosecution of the work of excavating said dry-dock pit, and
16 on the 22d of the same July the claimant commenced work. He had then expended large sums of money and incurred heavy in-

debtedness in order to perform the obligation of his contract, and was ready and prepared to perform it. The defendants had before that time sunk wells to serve as receptacles of the water in the pit, and they pumped the water out as it collected. The claimant commenced said work on the solid land, and nearly all the material excavated during the month of July was placed either in the south wing or in the front of the coffer-dam. During the month of August also he continued his excavations in the same place, and carried by far the greater portion of the excavated material into the coffer-dam.

VII. The defendants completed the work on the coffer-dam on the 25th August, 1873. They worked upon it with requisite diligence after the said 18th July, and completed it within a reasonable time. The filling by the claimant, referred to in Finding VI, went on simultaneously with the work of the defendants. By the end of August the claimant had filled the south wing and the front to within 30 feet of the north wing up to about low-water mark. The claimant during this period worked as large a force and did as much excavation and filling as he could at the time of making the contract reasonably have expected or have been expected to work or do.

VIII. During the months of September and October, 1873, the claimant continued his excavations without interruption in the same portion of the pit. In the course of the same October he ran a dike or dam nearly across the dock, to separate the pit in which he was working from the part of the site open to the tide. This dam was about the middle of the site of the dock, and was 8 or 9 feet high, and cost the claimant $350. He has been paid that sum for it.

Before the end of that October the claimant had excavated about 29,000 cubic yards of material. The work had been done with carts, and had been continued with a uniform force. The pit had been kept free from water by the defendants by the occasional use of a steam fire-engine to empty a small receiving-well. The claimant had made no complaint that the coffer-dam was not finished or that the sea end of the work was not free from water, or that he had not sufficient room to work his force economically.

IX. During the same month of September the defendants were employed in completing the coffer-dam and in taking the soft mud from the south wing. There was some delay in filling the north wing of the dam, owing to the neglect of the claimant to deposit there the material excavated from the pit. By the 2d of October, 1873, the dam was completed and the pump set at work. The dam at first showed some weakness, but the injury was repaired at once and the dam braced, and by the 1st November the water within the dam was reduced to a level 2 feet 6 inches below the average low tide and eight inches below the lowest low-tide. The bottom of the tidal space below the solid land, which was thus exposed, was a thin watery mud and slime, which ran from the carts as it was shoveled into them, and which would not have dried for some weeks if left in its bed. The nature of this bottom was well known to the claimant when he made his said contract.

17 X. After the bottom was thus exposed there was no time when there was water enough in the pit to prevent the claimant from working. The engineers in charge of the work were afraid that if all the water on the inside of the coffer-dam were pumped out the outward pressure would be too great for the coffer-dam in its then condition and cause its destruction. The water that was left was confined to the southeast corner of the inclosure, which was used as a well, and where there was a large drain-pipe. This was beyond the line of

the prism of the dock which the claimant was to excavate under the contract.

XI. During the month of November, 1863, the defendants were occupied in watching and strengthening the coffer-dam. The water was kept at about the level of the lowest low-tide until the 21st of this month, when it was pumped out, and nearly the whole surface laid dry.

During the same month the claimant excavated and removed about 9,000 yards of material. Before he commenced work in the pit a point had been indicated beyond which he could not work towards the coffer-dam without endangering it. As the excavations deepened and widened on the part of the site on which he was working the slopes of the roadways naturally increased in pitch and narrowed; but the claimant made no complaint of this, and asserted no right to work beyond the designated place. Some time in the latter part of October or early in November he substituted hoisting machinery driven by a steam-engine for carts and horses, and after that worked more rapidly and more economically.

XII. Before the hoisting apparatus was put in the material hauled away was in part put into the coffer-dam and in part was dumped near the excavation. After the hoisting apparatus was put in a rail-track was connected with it, and the claimant was required to dump the material on ground covered by tide at high water. There was a curve in the shore line between the dock and the hospital wharf. The defendants' agents desired to make a road on the arc of the curve across meadows which were covered at high water. Such of the material excavated in 1873 as was not used in the coffer-dam was dumped in this place, and all the material excavated in 1864 was dumped there. The claimant objected to dumping in this place, but he was required to do so; and was put to a greater expense than he would have been put to had he been permitted to dump the material at his own pleasure on the upland. The cost of such extra transportation of earth to the place of dumping was $2,835. The claimant has been paid that sum therefor.

XIII. The rainy season of 1873 set in in November, but did not retard work during that month. In December, 1873, January, 1874, and February, 1874, only six days' work of excavation in all was done. Estimates were made in the usual way upon all the work referred to in this and the previous findings, and the claimant was paid therefor on the said estimates in the manner called for by the contract, and without protest or objection on his part, or intimation that he was
18 not enjoying in the execution of the work all the rights given him by his contract, except the notice as to the dumping above set forth. When he stopped for the winter he had worked almost the whole space to which he had been confined to within 14 inches of the desired bottom.

XIV. If the water had been excluded from the site of the proposed excavation long enough before the 18th of July, 1873, to permit the mud on the eastern end to dry, and if the water had then been kept out, the claimant could have completed the work under his contract in 120 days; but in the condition in which the coffer-dam was on the said 18th day of July, it was impossible to complete it and to pump out the water earlier than it was done, or in such time that the claimant could complete the work within the term specified in the contract. Because the water was not out and the mud dry on the said 18th July, the claim-

ant was prevented from completing the work within the term named in the contract and before the wet season commenced.

XV. One hundred and nine days intervened between the signing of the contract and the commencement of the wet season. The shoring, timbering, and sloping of the sides of the excavation were sufficient to hold the banks in place and keep them from sliding during the dry season, but were an inadequate protection against slides when the rainy season set in. In consequence of defects in sloping and of the lack of proper timbering and shoring, heavy slides occurred during the winter. The claimant removed 9,493 cubic yards of earth that had been thrown into the pit by such slides. He has been paid therefor in full.

XVI. With the consent of the defendants the claimant resumed work in March, 1874, and continued working with a varying force up to the 5th of the following September. The defendants then took possession of the pit, and took the work out of the hands of the claimant. Up to the 15th May, 1874, be used powder for separating the hard clay material from its native bank. It was worth 25 cents a yard more to get out and remove the hard material without powder than it was with powder, and if powder was used in small quantities in each blast there was no injury or danger to the coffer-dam or the banks in its use.

In consequence of a severe blast on the 15th May, 1874, in which too much powder was used, the coffer-dam was started a little. The defendants' agent thereupon, on that day, ordered the claimant to cease using powder and blasting, and he did cease, and after that time made no use of powder, although the order was subsequently revoked. The claimant objected to this order. After its issue 15,320 cubic yards of material were excavated and removed without the aid of powder.

XVII. The total excavations made by the claimant under said contract were as follows:

	Yards.
"Prior to December 10, 1873	40,440
"Between December 8, 1873, and May 9, 1874	7,147
"After May 9, 1874	15,320
	62,907"

19 The claimant also removed 9,493 cubic yards of material which slid into the pit.

For all this he has been paid in full, at the contract prices, without objection, and has given receipts in full.

XVIII. After the said work was taken away from him the claimant preferred to the Navy Department the several claims which are set forth upon the fifth page of his petition, except the last item thereof, "for damages, loss of time, expenses, and for losses on property, as above, $45,000." The claim was referred by the Secretary of the Navy to the commandant of the yard at San Francisco, who had had the general supervision of the work. The commandant made thereon what the Navy Department styled an award, which was approved by the Secretary of the Navy. This award recommended that the claimant should be paid for the excavation and removal of 9,493 yards of slide, instead of 15,000 as claimed; for the construction of the dam, as claimed; for the extra transportation of the earth to the place of dumping, $2,835, instead of $6,500 as claimed, and that he should also be paid upon this account the sum of $500, for injuries to the railroad track at the place of dumping, and for the neglect to build the dam to keep out

tide-water $2,000, instead of $20,000 as claimed. The commandant recommended the rejection in toto of the items "for extra labor and expense by being prohibited the use of gunpowder in blasting, $17,848," and "for filling the north wing of the dam, $350."

On the 3d March, 1877, the Secretary of the Navy directed payment of $5,685, in accordance with this adjustment. Murphy was informed of this adjustment and of the principles upon which it had been made, and thereupon the following voucher was handed to him in duplicate, which he receipted in full, and on which he received the sum of $5,685.

"*United States Navy Department, Bureau of Yards and Docks, to Charles Murphy, Dr.*

"(Appropriation: Navy-yard, Mare Island, 1876–'77.)

"1877. Date of award, Jan'y 31. For amount awarded by the commandant of navy-yard at Mare Island, Cal'a, as damages arising out of contract for excavating the 'dry-dock pit' at that navy-yard, and ordered paid by the Hon. Sec't'y of the Navy, March 3d, 1877	$5,685
"Total	5,685

"BUREAU OF YARDS AND DOCKS,
"*March 3d*, 1877.

"Approved for five thousand six hundred and eighty-five dollars, payable by the Navy paymaster at Washington, D. C.

"J. C. HOWELL,
"*Chief of Bureau.*

"NAVY PAYMASTER'S OFFICE,
"*Wash., D. C., Mar.* 9, 1877.

"Received of W. W. Williams, paymaster U. S. N., fifty-six hun. and eighty-five dollars, in full of the above bill.

"CHARLES MURPHY."

Conclusion of law.

That, for the reason set forth in the opinion of the court, the claimant's petition must be dismissed.

20 *Opinion.*

DAVIS, J., delivered the opinion of the court.

The claimant excavated a large portion of the pit for a dry-dock at the navy-yard at Mare Island, California, under a written contract, and was paid for all the work done, at the contract prices, the sum of $46,551.18.

During the progress of the work the bank fell in more than once, and lodged large masses of clay in the pit. These, also, the claimant removed, and, although the contract obliged him to keep the banks protected, he was paid for the removal, as for material excavated under the contract, the sum of $7,024.32.

He then claimed remuneration for certain injuries which he said he had suffered by reason of the following acts of the defendants, which

he said were not authorized by the contract, and for some alleged extra work: (1) Delaying the construction of a coffer-dam so as necessarily to throw the execution of a portion of his contract work from the season of 1873, when it should have been done, into the season of 1874; (2) requiring him to haul the excavated material an unreasonable distance and dump it in an unsuitable place; (3) forbidding him to use gunpowder in a portion of the excavations; (4) the alleged extra work was the construction of a temporary dam and the extension of the pit-head. These claims were considered and a basis of adjustment was reached in the Navy Department, which was agreed to by the claimant, and he received $5,685 on these accounts.

He then brought this action. The further claim which he seeks to recover may be tabulated as follows from the two statements contained in his petition:

1. For excavating 15,000 cubic yards of slides, at 74 cents per yard		$11,100	
Less payment received at the same rates for excavating 9,493 cubic yards		7,924	
			$4,076
2. For extra labor and expense by being prohibited the use of gunpowder in blasting			17,848
3. For difference in place of dumping earth from pit		6,500	
Less payment for extra transportation of earth to place of dumping	$2,835		
And less amount allowed for injuries to railroad track at place of dumping	500		
		3,335	
			3,165
4. For filling north wing of dam			350
5. For extra expense in extending head of pit			1,500
6. For delays by government to exclude tide-water, in limiting place of working to less than whole site, and other obstructions		20,000	
Less amount allowed for neglect to build dam to keep out tide-water		2,000	
			18,000
7. For damages, loss of time, expenses, and for losses on property			45,000
			89,939

As to the first six of these items, we should have no difficulty in holding that the claimant is not entitled to recover on them, if it were an open question. It appears, however, by the last finding, that long after these disputes had arisen the claimant lodged these identical six claims with the Navy Department for adjustment; that they were inquired into there and a result reached by which some were allowed in full, some allowed in part, and others disallowed; that the result of this examination, which the Navy Department called an award, was submitted to the claimant with full information as to the principles upon which it had been reached; and that he then accepted payment of the amount awarded, and gave a receipt in full. This is clearly an accord and satisfaction of a disputed claim, which closes the doors of litigation.

21

The seventh item of the claimant's demands was not included in the settlement. It is a drag-net item, without details, aggregating $45,000. The claimants' brief furnishes no further light upon it; but in his requests for findings his claims swell to the following astounding dimensions:

Loss on excavations prior to December 9, 1873, by reason of limited space	$7,279 20
Loss by reason of inability to use plows	59,851 20
Loss by reason of extra expense in dumping	73,196 40
Extra costs of excavations between December 9 and May 9	15,866 34
Extra cost of excavations after May 15, 1874	65,188 00

Extra work at pit-head	4,094 64
Extra work in the slides beyond what has been paid for	21,074 37
Loss in sale of claimant's land	18,800 00
Loss in sale of claimant's machinery	15,385 00
Loss by idleness in 1873-'74	2,390 50
	283,125 47

The courts finds that of this gigantic claim only items to the amount of $5,685 have a good foundation in fact. These items were included in the settlement, and were paid in full.

The rules require counsel filing requests for findings to preface them by a statement that they consider them to be proven. We have too much respect for the good judgment of the learned counsel who signed the requests in this case to suppose that they regarded it as proved by any evidence, credible or otherwise, that this claimant, whose whole contract covered work of less than $50,000 in amount, was damnified over $283,000 in doing that work. We do not expect counsel on either side to frame requests from the judicial standpoint. We know that it is their duty to their clients to put the best foot of the case forward, and to present in the most favorable aspect all facts which they regard as proven on their theory of the case and on their contentions as to the admissibility and weight of evidence. Making due allowance for this, however, it is not unreasonable to expect them to proffer their requests under a sense of responsibility as officers of the court, invited to assist it in administering justice, and to avoid undue exaggeration, or argumentative statements, or conclusions of law in doing it.

The judgment of the court is that the claimant's petition be dismissed.

22 *Final judgment.*

At a Court of Claims held at the Capitol in the city of Washington, on the 7th of June, A. D. 1880, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant be dismissed.

23 *Appeal.*

CHARLES MURPHY, CLAIMANT
against
THE UNITED STATES, DEFENDANTS. } No. 11563.

Comes the said claimant, Charles Murphy, by his attorneys, and makes application for an appeal to the Supreme Court of the United States from the judgment of this honorable court dismissing his petition in the above-entitled cause.

CHARLES MURPHY,
By JAMES W. DENVER,
His Attorney.
LUTHER H. PIKE,
Associate Attorney.

Allowed:

C. D. DRAKE, *C. J.*

Filed July 20, 1880. A. H.

24 In the Court of Claims.

CHARLES MURPHY
vs.
THE UNITED STATES. } No. 11563.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the final judgment of the court, and of the application by the claimant for the allowance of an appeal, and of the order allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 21st day of July, 1880.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 745. Charles Murphy, appellant, vs. The United States. Court of Claims. Filed 25th October, 1880.

SUPREME COURT U.S.
FILED
DEC 14 1896

Supreme Court of the United States.

No. 745.

CHARLES MURPHY, APPELLANT,

vs.

THE UNITED STATES, APPELLEES.

BRIEF FOR APPELLANT.

JAMES W. DENVER,
LUTHER H. PIKE,
Attorneys for Appellant.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 745.

CHARLES MURPHY, APPELLANT,

vs.

THE UNITED STATES, APPELLEES.

BRIEF FOR APPELLANT.

August 13, 1872, the United States commenced making the necessary excavation for a dry-dock they contemplated building at their navy yard, on Mare Island, in the State of California.

At this time the waters of Napa bay ebbed and flowed over one-third or one-half of the site of this proposed excavation. The rest of the site was by a gradual rise above high-water mark.

At the time of commencing said work it was intended to make this excavation about 500 feet long, from east to west, and about 150 feet wide, from north to south. The bottom was theoretical, (Monthly Official Report for August, 1873; Printed Record, Court of Claims, p. 215,) but the intention was the dry-dock should have a depth of about 36 feet.

The eastern end, or foot, of the excavation was to be near the low-water line. Its western end, or head, that was to be semi-circular, was to be in the high ground, about 500 feet directly west from the eastern end.

In consequence of the waters of Napa bay so covering

so much of said site, it was necessary, in order to be able to complete the excavation, to construct a coffer-dam around the western end of the proposed excavation, and just beyond the low-water line.

To attain the end desired by the building of such coffer-dam, it was necessary that it, when completed, should be of such height and compactness; that when the water on the inside of it should be pumped out none should flow over or through it from the outside; and of such strength, that the water from the inside being removed, it would withstand the pressure of that upon the outside.

The United States commenced the construction of such coffer-dam about the same time they commenced making their said excavation.

The United States confined their excavating work to the western one-third of the site.

In the year 1873 the United States determined to have the remainder of the excavation made by private parties under contract, and to this end they, on the 14th of June, 1873, published an advertisement inviting sealed proposals for doing of said work.

In this advertisement they stated, among other things, that the amount of material to be excavated was about 90,000 cubic yards; that the cost of drainage while the excavation was in progress would be borne by them, and that further information than was contained in this advertisement would be furnished on application at the commandant's office at said navy yard.

A part of the further information so furnished bidders was the result of a boring made on the proposed site in order to ascertain the character of the materials to be excavated. But this part of the further information turned out to be incorrect and misleading. The boring did disclose the materials correctly, "except as to a blue marl or effervescent clay which was afterwards found in the bottom of the pit, but which from the borings was assumed to be ordinary blue clay."

Such was the uncontradicted testimony of Calvin Brown, who was the superintending engineer of the work, read by the defence on the trial in the court below.

Charles Murphy was the accepted bidder, and the contract between him and the United States was evidenced by a certain written instrument dated the 10th July, 1873.

A copy of said advertisement is set forth in the record of this case, page 9, and one of the instruments to evidence said contract on pages 4–7 of same.

On this 18th July, 1873, the United States discontinued their excavating work, having taken out on and before this day 18,900 cubic yards of material.

Murphy was bound by his said contract to commence work within 10 days next after said 10th of July, 1873, and to complete it within 120 days after said July 18, 1873, *i. e.*, on or before the 18th November, 1873.

Murphy was also to furnish for said work, and at his own expense, all necessary workmen, machinery and appliances for its accomplishment.

One stipulation of the United States was in these words—(specification 8), "but the Government is to provide and maintain the operation of all pumping machinery necessary for the drainage of the work, at its own cost and expense." The only other stipulation of the Government was in respect of the amount and manner of payment for the work to be done.

Murphy commenced work within the stipulated time, to wit: on July 22, 1873; having then expended large sums of money and incurred heavy indebtedness in order to perform the obligation of his contract, and was ready and prepared to perform it.

On this 22d July, 1873, said coffer-dam was about three-fourths completed, and the water still covered the ground as formerly. Immediately after he had entered upon his work, Murphy was directed by the supervising agent of the United States to confine his work to the western end of the site,

and the point beyond which he could not excavate to the eastward being indicated, he was thereby given only one-third of the site to work on.

This was the uncontradicted testimony of A. S. Bender, witness for the defendants, on the trial in the court, and who at the time the order was given was the United States superintendent of construction at said navy yard, as to the reason for said order being given: "At the time while the water was still flowing in and out of the pit, I instructed Mr. Murphy or his manager that the excavation should not proceed farther in the direction of the coffer-dam, because it was possible that, being cut thin, the wall of earth might give way, and the water rush into the pit, interfere with the further excavation of it, and at the same time, by the sudden withdrawal of the water from one side of the coffer-dam, subject it to a strain which in its then condition might be injurious to it."

This order greatly injured Murphy. It alone made it utterly impossible for him to complete his work in the 120 days stipulated. It not only precluded his using a large part of the appliances he had provided—an engine with its attendant machinery for hoisting purposes and 14 to 16 carts and teams were made to stand unemployed—but it also prevented his working advantageously the men, machinery and other appliances actually employed, by and through deprivation of ample roadways, and contracted space in which to work, the net result being an increase of expense by and through increased consumption of time and increased cost of the work actually done.

On the 2d October 1873, the coffer-dam was gotten so far towards completion as to permit the pumping out of the water that was on the inside of it to be begun.

But on the 5th of same month a break occurred in the north wing of the coffer-dam. The water from the outside rushed through this break carrying with it a portion of the earth filling. This break suspended pumping operations

several days, Murphy being required to replace the earth filling that had been so washed out of the coffer-dam into the inside.

In this same month of October, 1873, Murphy secured, after much begging, permission to extend his work to near the middle line of the site and to do this he had to construct an earth embankment some 8 or 9 feet high over about the said middle line of the site.

The object of the dam was to keep the water from flowing in upon the pit that was being excavated, and Murphy was enabled to extend his work up to within 12 or 15 feet of this embankment or dam.

And again in this same month of October 1873, Murphy deposited on the inside of the coffer-dam and to serve as a support to it a large quantity of the earth taken from the pit he was excavating. This he did by the directions of the United States navy yard officials.

The 18th day of November, 1873, arrived and passed without the Government having gotten the site entirely free from water, and without Murphy having completed his work within the 120 days stipulated.

Murphy could have completed his work within the 120 days stipulated but for the restriction as to working space imposed upon him and the failure of the United States to promptly exclude and keep water from the site.

Murphy, the United States tacitly agreeing, continued work under the same restrictions as to space until December 5th, 1873, when, the rainy season setting in, he was compelled to suspend work.

During December, 1873, a large quantity of earth was precipitated into the excavation that had been made by the sliding or caving of its sides under the influence of the rain and the effervescent quality of the clay at its bottom.

Both in January and February, 1874, Murphy made efforts to resume work, but the season not being favorable thereto he accomplished in each month only three days work.

On or about the 12th of March, 1874, the work was regularly recommenced by Murphy—the United States tacitly agreeing thereto—though hampered by the same restrictions as to the space within which he was to carry on his work.

With the intention of so resuming work, and in order to be able to do so, Murphy, during the said period of suspension from December 3, 1873, to March 12, 1874, expended some money for feed of the teams and pay of men that he had to keep on hand without being able to employ them about the work he had contracted to do.

Immediately after his said resumption of work, in March, 1874, Murphy was ordered to make a different disposition of the excavated material from that theretofore made of it. It was after this wise:

Between the site of the excavation, and a point on the island known as the hospital wharf, the shore line of the island curved inwardly.

The commandant of the navy yard (testimony of Calvin Brown hereinbefore referred to) was desirous of having an embankment made across the mud flat that lay within this curve or arc, and over the chord of said arc or curve, in anticipation of certain proposed improvements of the navy yard. He gave orders to have the embankment made over said chord of the arc, and thereupon the superintendent engineer directed Murphy to proceed to make it. There was no solid ground on the line over which said embankment was directed to be made. There was but soft mud of no known depth. The direction to Murphy was to construct the embankment to a certain height, and to keep the top width at 30 feet. Murphy protested against the order, but unavailingly. Proceeding in an endeavour to carry the order into effect he had these difficulties to contend with:

The tide rose and fell twice in each twenty-four hours around the tongue of loose earth he was pushing out into what was substantially a part of Napa bay.

As the tide rose the loose earth became saturated with

water, and as the water would recede much of the wet earth would flow off with it: of what would remain a large part would of its own weight sink into the soft mud that lay underneath.

The result was, that during the night time a great portion of the work done during the day would melt away, and each morning the railroad tract that was being used would have to be relaid, and all the work done then, instead of being upon firm ground, would have to be carried on ground that was so soft that railroad track, and carts, horses, and men would be continually sinking into it, involving them in confusion, and breakage of carts and constant and expensive delays, as, whilst there was delay at this dump there would be consequent delay at the excavation. The whole entailed upon Murphy loss of time and great increase in his expenses.

On May 15, 1874, and whilst Murphy was wrestling with the difficulties incident to the making of the embankment across said mud flat, an order was made by the superintending engineer in these words. "Sir: It being apprehended that in the present condition of the stone dry-dock excavation, the practice of blasting is prejudicial to the banks in affecting their stability, and also the work of the coffer-dam, you will discontinue the said practice, your contract requiring you to perform," &c.

Ct. of Clms. Record, p. 219.

As Murphy had been theretofore using gunpowder in blasting, and as its use in doing such work was customary, proper, and in this particular case almost an absolute necessity, in consequence of the character of the material he was excavating, he protested against the order, but unavailingly, and thereafter his work was done without the use of powder, at great additional cost.

Thus deprived of the use of powder, Murphy was able, during a particular period of time, to excavate but little

more than one half as much material as theretofore with powder he had gotten out with the same force during the same period of time.

On or about the 14th day of June 1874, the coffer-dam, object of the tenderest solicitude of the Government officials, was considered to have grown sufficiently to premit Murphy's being given the entire space to work on. On that day all restrictions as to space were withdrawn. (Ct. of Clms. Record, p.) and Murphy on that day had for the first time the whole of the site to work upon, but was still not allowed to use powder.

About this time and after Murphy had completed the excavation of the head of the pit and leveled off a large space at its then established bottom and had removed his appliances for work therefrom, the Government ordered the excavation to be made further to the westward and the bottom level to be lowered. Murphy proceeded to carry out the order, but it was at a cost to himself greater than the contract price he had agreed for, as to do the work of extending the pit he had to reform and replace his appliances.

During July and August 1874, Murphy was unable to advance the amount of money that was necessary to enable him to carry on the work with the same vigor that he had theretofore carried it on; and during these months he prosecuted the work with a varying and gradually diminished number of workmen.

On the 5th of September, 1874, the Government officials declared the contract annulled and took possession of the site, excluding Murphy; for the reasons, given as follows in the Report of the Commandant of said navy yard of January 31st, 1877. (Record Ct. of Clms., pp. 244–5.

"The contract was forfeited under its provisions looking to its forfeiture, and expressed to that end; because its time had long run out; because the dissatisfaction natural to a losing contractor communicated itself to those whose interests were opposed to his, viz: the Government superinten-

dents; and because it was slowly and unsatisfactorily prosecuted."

And further because "It was no longer for the interest of the Government to excavate the whole pit, since the anticipated appropriations to go on with the Government's part—concrete, masonry and granite—had not been made."

Immediately after this annullment of the contract the superintending engineer caused to be made a measurment of the excavation that had been made by Murphy and thereupon reported October 10th, 1874, that Murphy "during the time that has elapsed since the signing of his contract (July 18th, 1873,) he has removed from the dock proper, or that area included within the line of its masonry, fifty-eight thousand and seventy-seven (58,077) cubic yards, and from the streets at the head and sides of the excavation, four thousand eight hundred and thirty (4,830) cubic yards, making a total of sixty-two thousand nine hundred and seven (62,907) cubic yards; in addition to this quantity the contractor has removed on account of slides, caves, etc., etc., nine thousand four hundred and ninety-three (9,493) cubic yards, for which he is not entitled to pay; there yet remains in the pit, within the lines of the dock, twenty thousand two hundred and sixty-six (20,266) cubic yards of earth to be removed, which quantity will be required in embankment around the masonry, etc., etc.,"

(Record Ct. of Clms., p. 222.)

This measurement was made by taking the dimensions of the pit, considering them as representing a prism of solid earth and then computing the cubical contents of such prism.

Murphy contended there was an error in this computation to his injury, inasmuch as he in obedience to orders had at different times prior to June 14th, 1874, deposited large quantities of material excavated from the western end of the site on its eastern end in rear of and to support the

coffer-dam, which deposited material he had to take away after said June 14th, 1874; and inasmuch as said mode of computation made him no allowance for this amount of material so deposited and removed a second time.

This claim of Murphy was well founded as was testified to by Von Gelden, the Government official who made the measurement and computation. (Ct. of Clms. Record, pp. 188, 189.)

This is the explanation of why Murphy in his petition claimed a credit of 5,507 cubic yards more than the 72,400 cubic yards allowed him as by the report cited above.

Of the 72,400 cubic yards Murphy was credited with having excavated, 15,320 were excavated after he was prohibited the use of powder in blasting and without its aid.

After the contract had been annulled, those to whom Murphy had incurred indebtedness for the means wherewith he had carried on his said work, swooped down on him with vulpine voracity; mortgages were foreclosed and his other property seized upon under attachment and execution process, so that Murphy was quickly made to stand as a wrecked man financially, and as an importunate creditor of the United States.

In consequence of Murphy's earnest and continuous importunities, the Secretary of the Navy on the day of—— 1875, referred the matter to Mr. Von Schmidt, consulting engineer at said navy yard through the commandant thereof, to ascertain, if in equity, Murphy had any claim against the Government.

On the 13th July, 1875, said consulting engineer reported in favor of Murphy being paid for 9,493 cubic yards of earth removed as slides, and for which as was set forth in said report of October 13th, 1874, it had theretofore been held that he was not entitled to any payment. The report recommend payment at 74 cents yer cubic yard, *i. e.* $7,024.28.

On the 22d of February, 1876, no payment having as yet been made under said last mentioned report, the Secretary

of the Navy referred the claim of Murphy to the Commandant of said Mare Island navy yard for his consideration and report.

Then whilst this last mentioned reference was pending, to wit, on the 9th of June, 1876, Murphy was paid and receipted for the $7,024.28 so recommended to be paid to him by said Von Schmidt the consulting engineer.

Next after this, to wit on Jan'y 31st, 1877, came the report of the commandant of the navy yard under said reference of February 22d, 1876. In this report he recommended Murphy's being paid the sum of $5,685

This recommendation of said commandant was by the Navy Department styled an award, though this proceeding was, as was that of the said consulting engineer, wholly *ex parte.*

On the 9th March, 1877, Murphy received and receipted for $5,685 recommended to be paid him by said commandant. (Record p. 13.)

The Government refusing to further entertain Murphy's claim he brought his suit in the Court of Claims.

ARGUMENT.

This case was submitted to the Court of Claims by the council of claimant upon the theory that the case was originally one of an express contract between the claimant, Murphy, and the United States, but that in consequence of the failure of the United States to carry out their precedent stipulation, and because of requirements and exactions imposed upon Murphy *dehors* that contract there arose an implied contract upon which the action was predicated. That it bound Murphy to expend large sums of money in order to be able to begin and complete the work contracted for within the time stipulated; and the United States to get the water off the site and give Murphy the whole site to work upon, so as to enable him to do the work within the time stipulated.

That Murphy's stipulation to complete the work within the time specified was dependent upon the United States stipulation to get the water off the site and give him the whole site to work over in such time as would enable him to carry out his stipulation.

That as Murphy could and would have fully carried out his stipulation, but for the failure of the United States to carry out their precedent one, it was but just and lawful for the United States to compensate him fairly for any damage he suffered by reason of such failure on their part.

That if the Government saw fit to creep along, working with an inferior force of workmen and only eight hours per day, it and not Murphy should be responsible for the consequence of such slow proceeding.

Their theory was, further, that the testimony clearly established that the direct result of the failure of the United States to carry out their said stipulation precedent, was to require of Murphy the giving of a greater amount of his time and personal attention to the work than he had contracted to give to it, and also to incur and meet, during this extra time, expenses correlative with it not contemplated by the contracting parties or provided for in and by the contract.

That it subjected Murphy to the adverse influences of the winter weather during which no work could be done, but during which there was not a complete suspension of his expense account.

That this failure was aggravated by the restriction imposed as to the space within which the work had to be carried on, and by the difficulties incident to the attempt to utilize him for the construction of an embankment across a mud flat that was substantially a part of Napa Bay, and subject to which he was required to get rid of his surplus of excavated material; and finally by the deprivation of the use of powder to which he was subjected.

And that the immediate consequence of these aggravating circumstances was to increase the actual cost of the

work done, far beyond what it would have been had he not been subjected to them.

Their theory was, further, that all these circumstances being considered, a settlement or payment to him upon the basis of the contract price, 74 cents per cubic yard, was neither an adequate, just, legal, or decent compensation to be made him.

That, in other words, upon every principle of justice and decency the United States were obligated to pay Murphy a reasonable *quantum meruit* for the whole work done by him, all the circumstances under which he did it being taken into consideration.

They believed that this theory of the case is consonant with the decisions that have been made by this Court, in exposition of the law governing contracts between the United States and private individuals, such for instance as here follows:

I. When the obligation of one party to a contract requires of him the expenditure of a large sum, or the incurring of obligations in preparation to perform, and a continuous readiness to perform, the law implies a corresponding obligation on the other party to do what is necessary to enable the first to comply with his agreement.

United States *vs.* Speed, 8 Wall., 77.

II. The contractor is entitled to such damages as he sustains by the failure of the Government to fulfill such a corresponding obligation on its part.

Manufacturing Company *vs.* United States, 17 Wall., 595.

III. When the Government fails to perform the corresponding obligation resting upon it to do what is necessary to enable the contractor, ready to perform his work, to comply with his agreement, no safer rule can be found for the measurement of the damages suffered by the contractor by

reason of such failure, than the difference between the cost of doing the work and what the contractor was to receive for it, making allowance to the contractor for the greater time engaged, and the increase of care, trouble, risk, responsibility, attending a full execution of the contract.

United States *vs.* Speed, 8 Wall., 84.

P. W. and B. R. Co. *vs.* Howard, 13 Howard, 344.

Said this Court, in Bulkley *vs.* United States, 19 Wallace, 40:

"In making ready to meet the requirements of the notices, Bulkley was subjected to the loss of time, to trouble, and expense. He is entitled to be paid accordingly. Such is the implication of the contract, and what is implied in a contract, deed, will, or statute, is as effectual as what is expressed.* Human affairs are largely conducted upon the principle of implications."

* United States *vs.* Babbit, 1 Black, 61.

In Parish *vs.* United States, 100 U. S., p. 507, this Court cited with approval Bulkley *vs.* United States, *supra.*

IV. The United States are liable for damages resulting from an improper interference with the work of a contractor, to the extent of the loss thereby inflicted.

United States *vs.* Smith, 94 U. S. Sup. R., 217.

Amoskeag Co. *vs.* United States, 17 Wall., 592.

Smoot's Case, 15 Wall., 47.

Clark's Case, 6 Wall., 546.

Clark's case, *supra*, was where Clark *contracted with the United States* to build an embankment at the navy yard, at Memphis, Tennessee, in such manner and places as should be directed by the engineer, &c., for a certain sum per cubic yard. The place selected by the engineer was such that there was a natural settling of the batture or foundation,

while the embankment was being built, and a consequent waste and shrinkage of the embankment. This Court held that any system of measurement which did not allow for the embankment which supplied the place of the settling was not a correct one.

In our case, Murphy never contracted to build an enbankment. The imposition that was heaped upon him to make one across the mud flat was a palpable and gross violation of both the spirit and letter of the contract that only required him to deposit the excavated material not needed for the filling of the coffer-dam *on the island*, at some not inconvenient place, and in the manner in which such waste material is usually gotten rid of.

V. A request by the Government for a change for its benefit in the structure of the work contracted to be done or made for it, such request implies such an extension of time as was known to be necessitated by that improvement, and the Government must be bound by this reasonable intendment as an individual would be.

Manufacturing Co. *vs.* United States, 17 Wall., 595.
McCord's case, 10 Ct. Clms., 156.

VI. A contractor performing under a written contract may recover for extra work and material furnished and accepted, though not covered by any written agreement.

Hawkins *vs.* United States, 96 U. S., 694.
Grant's case, 5 Ct. Clms., 72.
Kingsbury's case, 1 Ct. Clms., 13.

VII. A provision in a contract that if default be made in the performance of their work by the contractors within the time stipulated, is a condition subsequent, which cannot be enforced where the Goverment delays the contractors, who subsequently exercise reasonable diligence.

Harvey's case, 8 Ct. Clms., p. 901.

Murphy, in his petition, measured the amount of such reasonable compensation by the balance he asked the Court to give him judgment for over and above, and in connection with the amount of the credits he allowed the Government, being the several payments made to him on account.

Without amendment of his petition he could get no larger sum than the balance so claimed, no matter what the testimony proved the *quantum valebat* of the work to be.

No amendment of his petition was made to enlarge the amount claimed as upon such balance, and at the trial Murphy stood restricted to the amount of the balance so claimed.

The testimony upon which Murphy submitted his case was, *first*, in regard to the amount, kind and value of the property taken from him by his creditors in their voracious industry to secure payment of the indebtedness due them respectively; and *second*, in regard to the actual value of the work done by him, in consideration of all the disadvantageous circumstances under which he did it.

In their request for finding of facts preferred to the Court of Claims, Murphy's counsel endeavored, in all fidelity to the court as well as to their client, to show just what the testimony of almost the score of witnesses who testified for the claimant in regard to the matter proved, in their estimation, proved was the actual value of the work done, and took especial pains to show to the court that they fairly canvassed the testimony.

The counsel were not unaware that the testimony of these witnesses fixed the value of the work done at a figure largely in excess of the amount Murphy, in and by his petition, asked judgment for against the United States; they submitted it, not to enlarge the amount claimed by the petition, but because it was the testimony, and because they hoped that it would convince the court that the amount claimed by Murphy was within reasonable bounds—and this especially, when this testimony of Murphy's witnesses

was not opposed by anything offered by the United States on that point.

The Court of Claims found as a fact (eighteenth finding) that the report of the commandant of said Mare Island navy yard, styled an award and approved by the Secretary of the Navy, suggested or rather made an adjustment of Murphy's claim. That the Secretary of the Navy directed payment to Murphy of $5,685 in accordance with this adjustment. That Murphy was informed of this adjustment, &c., and then, adjudged that when Murphy received the $5,685 so directed to be paid to him and receipted in full the voucher on which that sum was paid him, this acceptance of the payment of the sum so directed to be paid to him, and his receipting of said voucher in full, was clearly in accord and satisfaction of a disputed claim that closed the doors of litigation. The United States did not impose any terms upon Murphy's acceptance and receipting for them respectively, nor considered that they were offering what, if accepted, was to stand as an accord and satisfaction.

Murphy had the right to have such terms proposed and put upon an acceptance or refusal under them, and should not be held to have been entrapped into accepting an accord and satisfaction merely by and through his having signed the usual blank form on which a particular sum of money is paid, and exclusively for that particular sum.

In the first place if the defendants believed there was an accord and satisfaction, and intended to rely upon it as a ground of defense, they should have put it in issue by some special plea.

Such an issue was not before the court, not being raised by the plea or traverse filed on behalf of the defendants.

The receipt given by Murphy was simply for ~~$5,685~~ "in full of the above bill."

The voucher handed Murphy, and the receipt he gave, were upon the printed forms used by the department when paying and taking receipt for a particular sum of money on

account in the ordinary transaction of business, and the receipt in this instance was identical to those given by Murphy for every other payment that had theretofore been made to him. It was a receipt for the particular sum paid, and nothing more.

The court might, with just as much reason, have adjudged that Murphy's acceptance of the $7,024.68, paid him June 9, 1876, and his receipt in full of that bill and voucher, was an accord and satisfaction and closed the doors of litigation.

In making said payment of $5,685, as in making that of $7,024.68, the Government did not impose any terms upon Murphy's acceptance and receipt for them respectively, nor considered that it was offering what, if accepted, was to stand as an accord and satisfaction. Had it so considered, it would have had the receipt show that the payment was accepted upon such terms, and not permitted it to be merely for the particular sum paid.

Murphy had the right to have such terms proposed and to be put upon an acceptance or refusal under them, and should not be held to have been entrapped into accepting a payment for the smaller sum of money as satisfaction of the larger one he was claiming was justly due him, merely by and through his having signed the ordinary receipt that is on the forms used by the department when making payments on ordinary accounts, and the more especially when it differed not one whit from all the other receipts he had signed, and was expressly restricted to the particular sum paid.

The amount paid was under all the circumstances grossly inadequate, and Murphy never had the faintest idea, when he received and receipted for the $5,685, that he was working an accord and satisfaction of his claim.

It is absolutely certain he never so understood it or so intended it, and surely his understanding and intent should have some weight in the matter.

"To constitute an acceptance in satisfaction there must be an act of the will. Every *receipt* is not an *acceptance*."

Alderson B., in Hardman *vs.* Bellhouse, 9 Mes. and Wel., 599. Acceptance in satisfaction depends upon the intention of the parties.

Hart *vs.* Boller, 15 S. and R., 162.
Jones *vs.* Shawhan, 4 W. and S., 257.
Thermerhorn *vs.* Loines, 7 John, 311.
Porter *vs.* Talcott, 1 Cowen, 359.

The reference of Murphy's claim by the Secretary of the Navy was to the very commandant who had imposed upon Murphy the burden of constructing the embankment across the mud flat, under an erroneous conception that the contract conferred upon him the right to make that exaction.

This reference though doubtless well intended, was, nevertheless, to one not unbiassed and unprejudiced. Of this the commandant's report is the most ample evidence.

The action of the commandant was of one adjudging his own cause. Besides it was wholly *ex parte*, and his report one-sided.

The reference did not make the commandant to be a judicial body. Murphy never appeared before him nor submitted anything for his consideration, and never was in any sense heard by him.

There was not in the proceeding a single element of an arbitration, and Murphy being no party to the proceeding, by a well known rule there was no mutuality between him and the United States, and as the commandant's findings could not bind the United States so they neither could nor did bind Murphy.

United States *vs.* Clark, 96 U. S., 40.

In the case of the District of Columbia *vs.* Cluss, 103 U. S., 706, though Cluss voluntarily submitted his claim to the board of audit of said District, created by act of Congress to audit certain claims—Cluss being one within the purview of the act—and though said board found that nothing was due Cluss, yet this Court sustained a suit afterward brought by him on the same claim, and in the course of its opinion said: "That board was not a judicial body, whose action was final; it exercised little more than the functions of an account. A claim allowed by it was not necessarily a valid one; a claim disallowed was not, therefore, illegal. Its action either way left the matter open to contestation in the courts."

Cannot this with greater reason be said of Murphy's claim, when there was no submission and no hearing?

The commandant of the navy yard was in respect of Murphy's claim not even an accountant and his report amounted to nothing more than an expression of his opinion—the opinion of a strongly biased individual—that Murphy might with justice be paid $5,685.

The circumstance of his giving the reasons that induced him to be of that opinion in no wise affects its status or effect.

And if the opinion of the commandant did not conclude Murphy and did not have the effect to make valid that portion of the claim he was favorable to, or illegal that portion he was unfavorable to, then we do not see how, from his consideration and opinion, or upon the sum he recommended to be paid, any presumption whatever could arise that Murphy considered, or was bound to consider, that sum or opinion as an accord of his claim.

If we look to the amount recommended to be paid alone, then we would say that if there was any presumption at all it was that Murphy did not consider it as an accord; *first*, because the amount so recommended was so very much smaller than that he was claiming was justly due him; and

second, because he, standing a financial wreck, knew that the sum so recommended to be paid him was so grossly inadequate that it would go but a very little way towards making him whole in respect of the losses actually sustained by him through his fidelity to his contract.

But to perhaps the better illustrate our idea upon this point, as also to show how essentially necessary it was for there to have been a submission and contestation of his claim by Murphy to and before the commandant, in order that there should have been some ground upon which to base a presumption that Murphy regarded, or was bound to regard, the commandant's report or opinion, or the sum he recommended to be paid as an accord of his claim, we respectfully invite the Court's consideration of their opinions in these cases, viz:

United States *vs.* Adams, 7 Wall., 479.
United States *vs.* Child & Co., 12 Wall., 243.
United States *vs.* Justice 14 Wall., 538.

Now if we are not mistaken in our opinion that the opinion of the commandant left the matter of Murphy's claim open to contestation in the courts, and that his action or opinion furnished no basis for a presumption that Murphy regarded his action on the sum he recommended to be paid, then a supposed accord and satisfaction, is predicated upon Murphy's mere acceptance of the said sum and the receipt he gave and nothing more.

To hold that an accord and satisfaction of Murphy's entire claim was made by his merely accepting and receipting for the particular sum the commandant had recommended to be paid him, and because he knew that such recomendation had been for an account of certain items of his claim, the others being rejected with a sneer, and perhaps the reasons advanced for making such recommendation would be, it is. most respectfully submitted, rather an after declaration of the will of arbitrary power, putting its own construction

upon an act done, that this act must be taken and held to have a result thus and so, merely because it so willed it, rather than a dispassionate judicial announcement that such result was intended by or flowed from the concurrence of two minds agreeing that the act done should effect such result.

It is respectfully submitted, that for the reasons above given there was error in the finding and judgment of the Court of Claims to the claimant's injury.

1st. In holding that what had transpired between Murphy and the United States prior to the institution of the suit in that court had made an accord and satisfaction of Murphy's whole claim that closed the doors of litigation.

2d. In failing and refusing to render judgment in Murphy's favor for the amount, it was shown by the testimony the work done by him, under all the circumstances of the case, was actually worth but not in excess of the amount of the balance which he claimed in and by his petition was due and owing to him after the allowance of all just credits.

And now to the end that there may ultimately be a settlement between the United States and Murphy, who to-day stands financially ruined by and through his fidelity to his contract with the United States, that will accord at once with the merits of his claim and be consonant with and becoming the greatness, the honor, and sense of justice of the United States, we do most respectfully invoke for our client's cause the Court's most patient and careful consideration.

James W. Denver,
Luther H. Pike,
Attorneys for Appellant.

In the Supreme Court of the United States.

CHARLES MURPHY, APPELLANT,
vs.
THE UNITED STATES.
} No. 745.

APPEAL FROM COURT OF CLAIMS.

ARGUMENT FOR UNITED STATES UNDER RULE XX.

In the Supreme Court of the United States.

CHARLES MURPHY, APPELLANT,
vs.
THE UNITED STATES.
} No. 745.

APPEAL FROM COURT OF CLAIMS.

ARGUMENT FOR UNITED STATES UNDER RULE XX.

The claimant, on the 18th of July, 1873, agreed to perform the necessary excavation for the dry dock at the navy-yard at Mare Island, California, and complete the work in 120 days. In September of 1874 the United States took possession of the pit, and took the work out of the hands of claimant. He thereupon preferred to the Navy Department his several claims for extra labor and damages resulting from alleged violations of the contract. The commandant of the yard recommended payment of $5,685; the Secretary of the Navy approved the allowance, and the claimant, with full knowledge of the adjustment by the commandant, accepted that sum as in full of the amount awarded. After this he brought suit in the Court of Claims for the identical items which had been passed upon by the commandant, and the

court, holding the payment and receipt in full to work accord and satisfaction, dismissed the petition.

BRIEF.

The first question presented in this case is whether the facts set forth in finding XVIII, (record folio 19) worked accord and satisfaction.

By the receipt at the conclusion, Murphy accepted the $5,685 as "in full of the above bill." The bill itself does not show the items for which the money was paid, but it does show that it was "for amount awarded by the commandant * * * as damages arising out of contract * * * ."

The court finds that Murphy was informed of the adjustment, and of the principles on which it had been made. The voucher, therefore, had the same force as if the adjustment of the commandant had been incorporated therein.

We admit that the award or adjustment had no legal force, and was not in itself binding upon the claimant, but we contend that the XVIII finding brings the case within United States *vs.* Child & Co. (12 Wallace, 232), and cases there cited.

This disposes of the claims for "excavating 15,000 yards," for prohibition against powder, for difference in place of dumping, for filling north wing of dam, and for delay in excluding tide-water, as set forth in claimant's petition (folio 5). The items of claim for excavating 62,907 yards and for constructing dam claimant admits (same folio) to have been paid.

The item "For damages, loss of time, expenses, and for losses on property as above, $45,000" seems rather, by reason of the words "as above," a general claim for specific items than an additional claim.

At all events, there is nothing in the findings of the court which would justify a judgment for any part of that item, and we presume it will not be pressed.

II.

Should the court hold that claimant is not bound by accepting the money and giving the receipt in full, it will then be necessary to inquire whether the court erred in dismissing the petition on the facts found by them.

On this point the court below says, "as to the first six of these items, we should have no difficulty in holding that the claimant is not entitled to recover on them if it were an open question."

1. On the claim in the petition "for excavating 15,000 cubic yards at 74 cents per yard," the court finds (XV and XVII) that he removed 9,493 cubic yards, which fell into the pit, and that he has been paid therefor in full.

3. On the claim "for difference in place of dumping earth for pit," the court finds (XII) that the cost of such extra transportation was $2,835, which sum he has been paid."

4 & 5. As to the claims "for filling north wing of dam," and "extra expense in extending head of pit," the court below makes no finding; it may therefore be assumed, for the purpose of this appeal, that the work claimed was not done. This leaves only the two items for delay to exclude tide-water and the disuse of gunpowder.

6. For the former the claimant has been paid under the adjustment $2,000, leaving still claimed $18,000. The court does not find how much claimant was damni-

fied by the delay in excluding the water from the pit. The XIV finding is as follows:

If the water had been excluded from the site of the proposed excavation long enough before the 18th of July, 1873, to permit the mud on the eastern end to dry, and if the water had been kept out, the claimant could have completed the work under his contract in 120 days; but in the condition in which the coffer-dam was on the said 18th day of July it was impossible to complete it and to pump out the water earlier than it was done, or in such time that the claimant could complete the work within the term specified in the contract. Because the water was not out and the mud dry on the said 18th July, the claimant was prevented from completing the work within the term named in the contract and before the wet season commenced.

It will be observed that the Court of Claims, in determining as a matter of fact (see Milwaukee Railway Company *vs.* Kellogg, 94 U. S. 469, 474) what was the proximate cause that prevented claimant from completing the work within the time named in the contract, says *it was the condition of affairs on the day of the contract.* It is neither stated nor suggested in the findings that the injury to claimant resulted from any omission or commission of the defendants after the contract was entered into. On the contrary, the court finds (VII, folio 16) "The defendants completed the work on the coffer-dam on the 25th August, 1873. They worked upon it with requisite diligence after the said 18th July, and completed it within a reasonable time." (VIII, folio 16)." "The claimant had made no complaint that the coffer-dam was not finished, or that the sea end of his work was not free from water, or that he had not sufficient space to work his force economically." (IX.) "There was some delay in filling the north wing of the dam, owing to the neglect of the claimant to deposit there the material excavated from the pit."

As the defendants have done nothing and have omitted nothing which they expressly or impliedly promised in the contract of 18th July, 1873, and as claimant's injury resulted from his improvidence in agreeing to complete within 120 days, there can be no claim against the United States.

The United States have waived their claim for the stipulated penalty, and still further have paid him not only $2,000 for this delay, but also $7,924 for removing 9,493 cubic yards which through his own neglect fell into the pit, so that he cannot complain of injustice or even want of generosity.

It may be urged that the United States covenanted that by working "with requisite diligence and by completing the dam within a reasonable time" the drying process would go on with such rapidity as to enable the claimant to complete within the stipulated time; but the court finds (IX) that "the nature of this bottom was well known to the claimant when he made his said contract."

All that can be said is that the claimant for the benefit of the United States stipulated to complete the work within 120 days, and the United States have waived their rights in the matter.

2. It appears from finding XVI that after May 15, 1874, claimant did his work without the use of powder; that this increased the expense 25 cents per cubic yard, and that 15,320 cubic yards of material were excavated and removed without the use of powder, although the order was subsequently revoked. If this claim is not closed by acceptance of the money awarded, if the order prohibiting the use of powder *was in violation* of the contract, and if the order had not been revoked, his

damages on this score are $3,830. But it is clear that he should only recover for the amount excavated while the order was in force, and this amount the court has not *found.*

By the contract claimant agreed to perform the work in a perfectly secure and workmanlike manner and according to the nature and requirements of the dry-dock works (folio 7). It was from no imaginary insecurity that he was forbidden to use powder, for the court finds (XVI) that "in consequence of a severe blast on the 15th May, 1874, in which too much powder was used, the coffer-dam was started a little," and thereupon the prohibition issued. Even if powder were an ordinary method for excavating under such circumstances, its abuse by claimant on the 15th May, 1874, justified the United States in ordering its discontinuance. It would seem that the claimant recognized the necessity for its disuse, for after the order was revoked he did not resume blasting. In the absence of an express permission in the contract to use powder, we submit that claimant had no right to use that which by the carelessness of his employés in making an overcharge might at any moment bring down on his work and workmen the water kept in check by the coffer-dam.

In conclusion, we submit that under the adjustment of the commandant giving him $7,924 for earth that fell into his excavation—in face of the fourth specification, (folio 11), $2,835 for change in place of dumping, in face of the fifth specification (folio 11), and $2,000 for delay in constructing the coffer-dam, despite the fact that the United States used requisite diligence and completed the same in a reasonable time, the claimant has

received money that he was not entitled to; but the United States have uniformly treated the payment of March 9, 1877, as a final settlement, and we submit that it was such.

S. F. PHILLIPS,
Solicitor-General.
JOHN S. BLAIR,
For the United States.

Transcripts

O[illegible]

1001

383

Supreme Court U. States

14 Otto

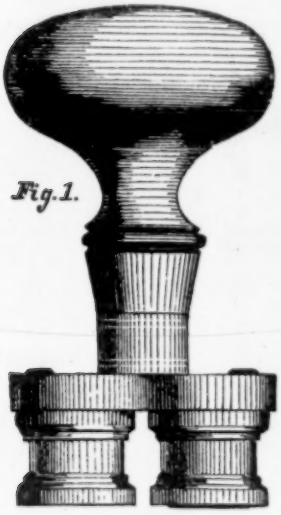
465 = 575

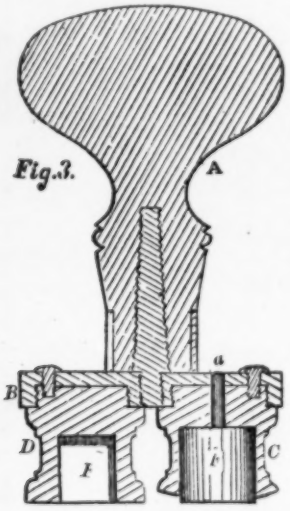
28

REISSUE LETTERS PATENT.

MARCUS P. NORTON'S POST OFFICE STAMP.

No. 4143. REISSUED, Oct. 4, 1870.





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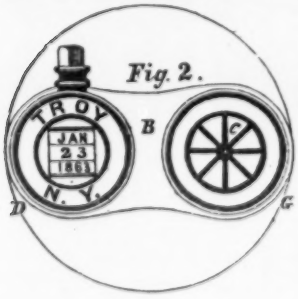
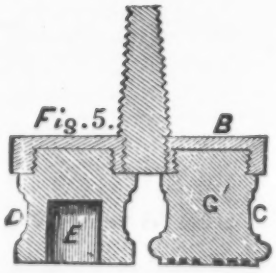
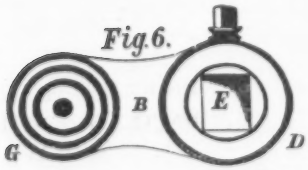
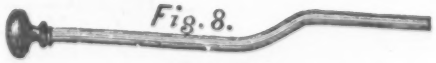


Fig. 4.







Witnesses:
EDW. W. DONN.
N. E. FILLMORE.

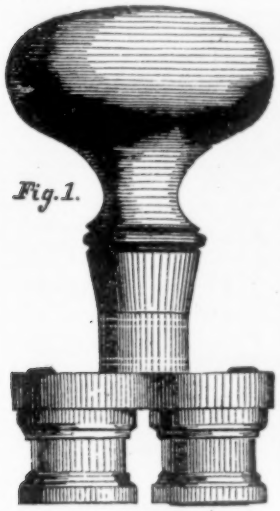
Inventor:
MARCUS P. NORTON.

73

REISSUE LETTERS PATENT.

MARCUS P. NORTON'S POST OFFICE STAMP.

No. 4143. REISSUED, Oct. 4, 1870.



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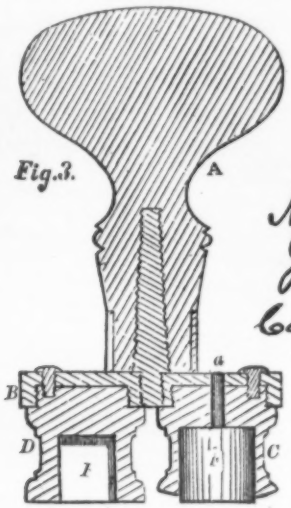

Fig. 3.

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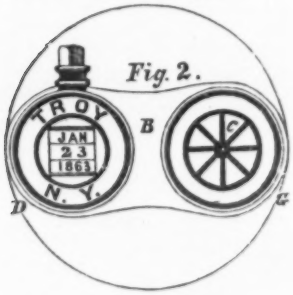
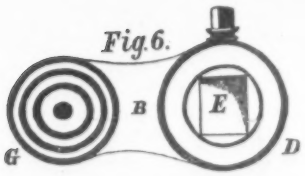


Fig. 2.

Fig. 4.



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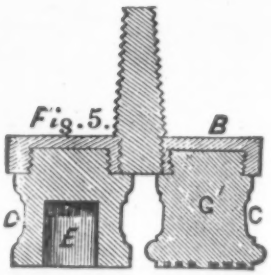


Fig. 5.

Fig. 7.

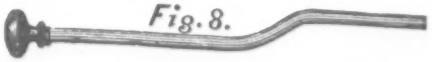


Fig. 8.

Witnesses:
EDW. W. DONN.
N. E. FILLMORE.

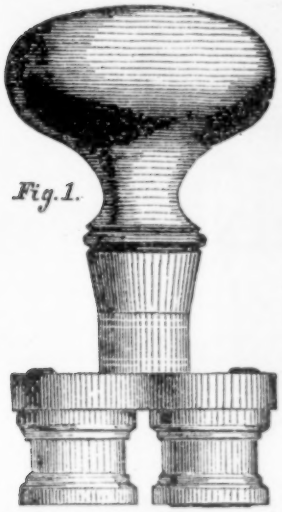
Inventor:
MARCUS P. NORTON.

899

ORIGINAL LETTERS PATENT.

MARCUS P. NORTON—HAND STAMP.

No. 38,175. PATENTED, April 14th, 1863.



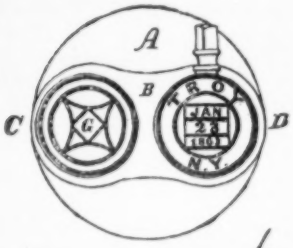


Fig. 2

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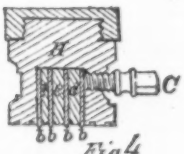
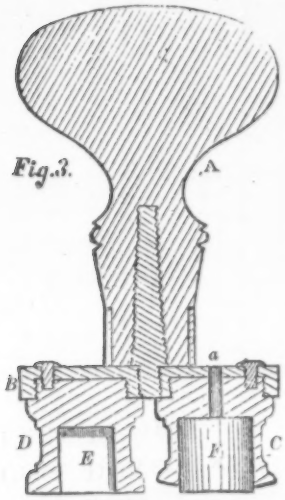


Fig 4



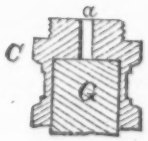


Fig 5

Witnesses:

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URIEL DEXTER.

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MARCUS P. NORTON

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page 908

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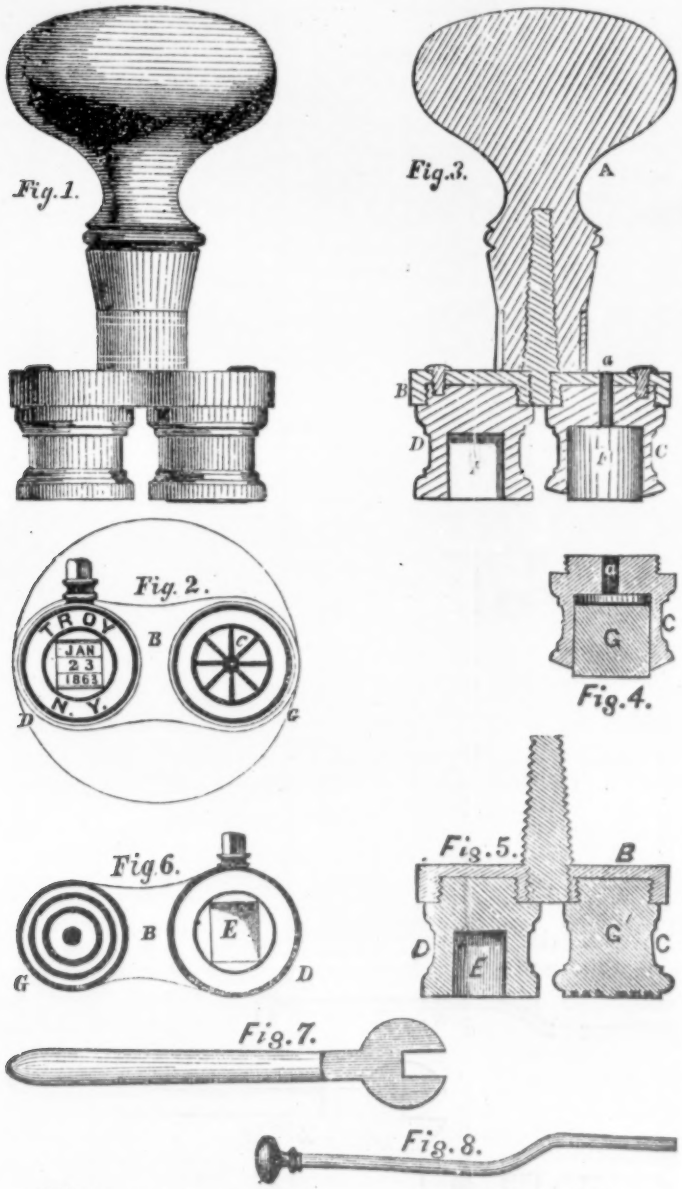
REISSUE LETTERS PATENT.

MARCUS P. NORTON—POST OFFICE STAMP.

No. 1748. REISSUED, Aug. 23, 1864.



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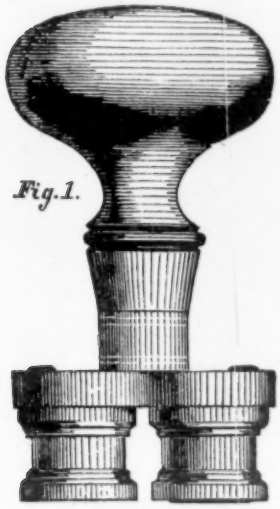
page 927

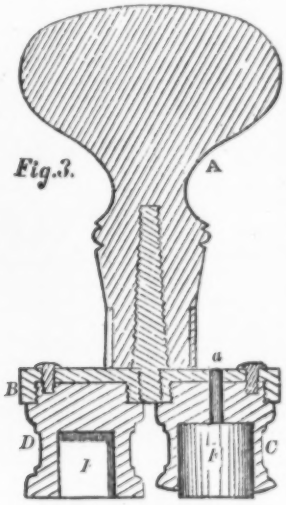
927

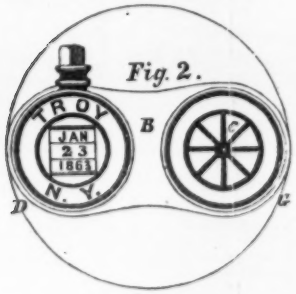
REISSUE LETTERS PATENT.

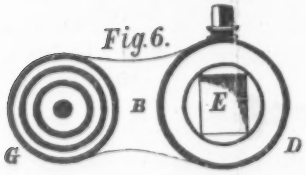
MARCUS P. NORTON—POST OFFICE STAMP.

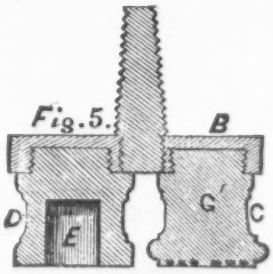
No. 3586. REISSUED, Aug. 3, 1869.











Witnesses:
BENJ. H. HALL.
C. L. ALDEN.

Inventor:
MARCUS P. NORTON.

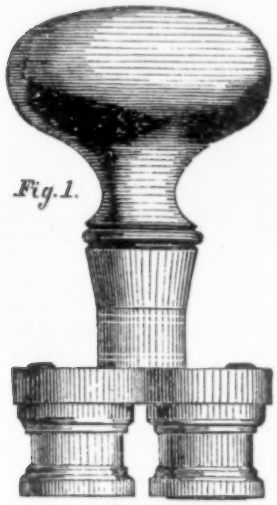
No. 945 James v. Campbell } page — 946

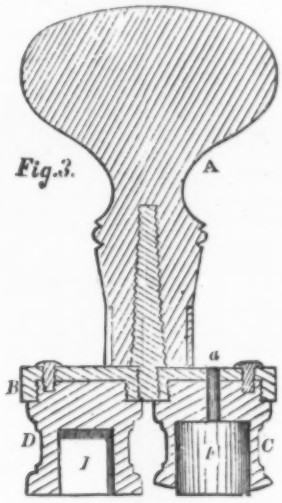
"DIVISION—A."

REISSUE LETTERS PATENT.

MARCUS P. NORTON—POST OFFICE STAMP.

No. 4143. REISSUED, Oct. 4, 1870.





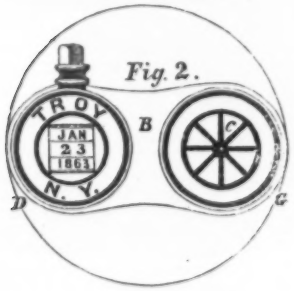
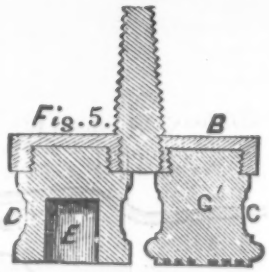
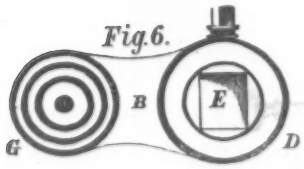
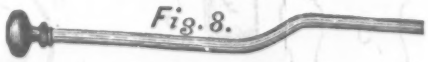


Fig. 4.







Witnesses:
EDW. W. DONN.
N. E. FILLMORE.

Inventor:
MARCUS P. NORTON.

96B.

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James
v.
Campbell
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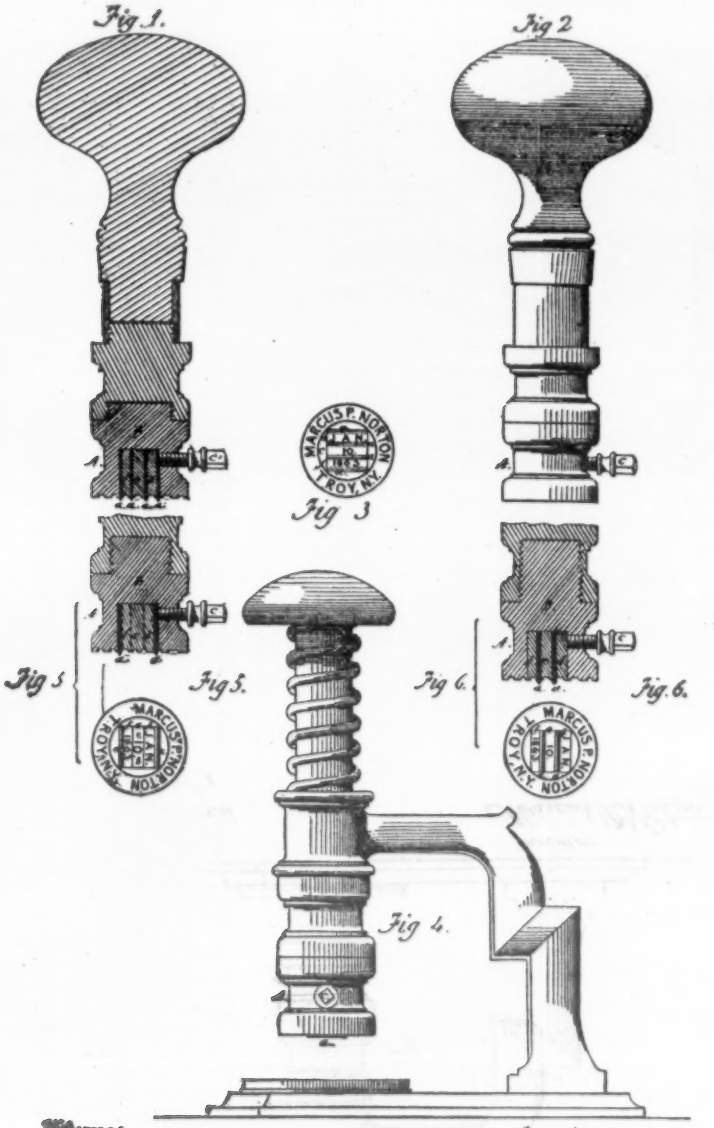
"DIVISION—B."

M. P. Norton,
Hand Stamp.

No 4144. Reissued Oct 4. 1870.



Witnesses;
Edw W. Down
John P. C. Prindle

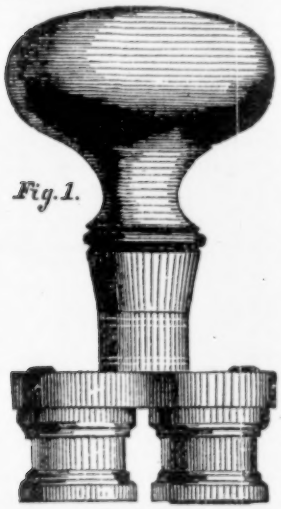
Inventor,
Marcus P. Norton

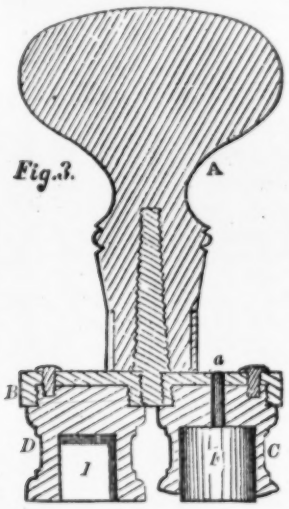
No. 945 James v. Campbell } page 1029

REISSUE LETTERS PATENT.

MARCUS P. NORTON—POST OFFICE STAMP.

No. 1748. REISSUED, Aug. 23, 1864.





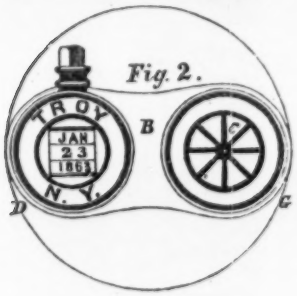
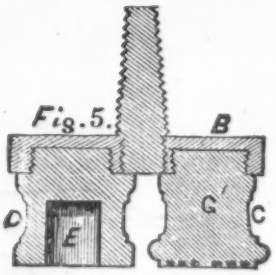
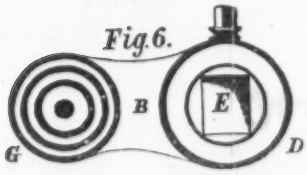
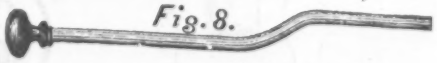


Fig. 4.







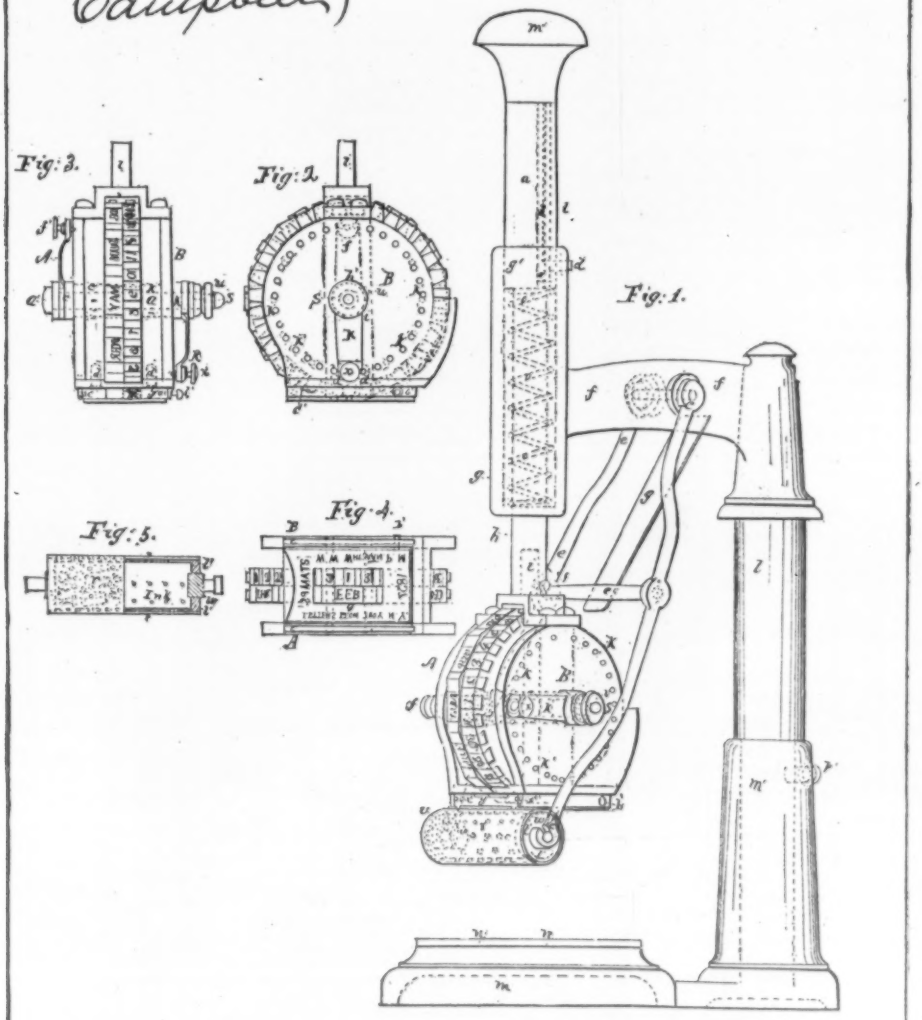
Witnesses:
BENJ. H. HALL.
C. L. ALDEN.

Inventor:
MARCUS P. NORTON.

PT 447

Norton & Haskins.
Hand Stamp.
Filed Oct 15. 1867.

No. 945
James
V.
Campbell
page 1144.



Witnesses
Edward A. Rosser
Wm. T. Fraser

Inventors
Marcus P. Norton
C. A. Haskins

Neagle per. Copy

No. 9445
Jones
v.
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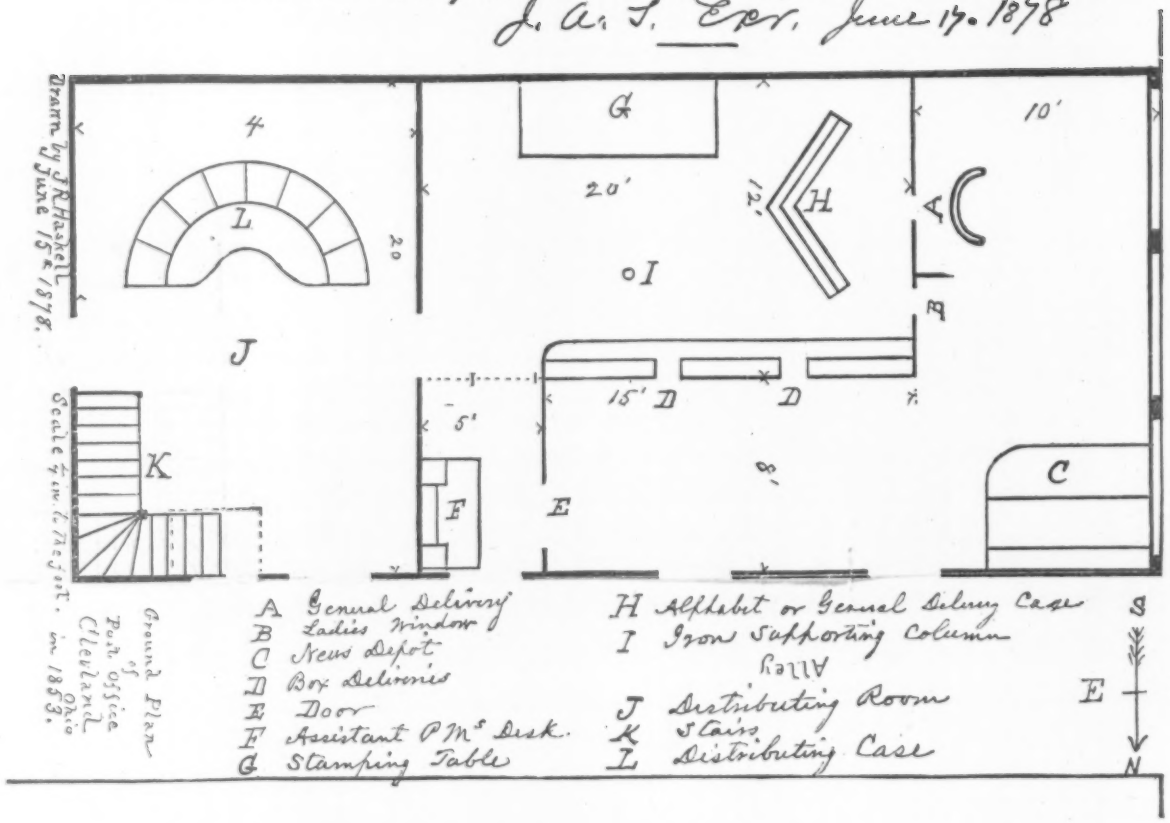
Complainants Exhibit No 1 Haskell
J. A. S. Exr. June 17. 1878



Drawn by J R Haskell June 15th 1878.

Scale 4 in. to the foot.

Ground Plan Post Office Cleveland Ohio in 1873.

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page 1258

M. P. Norton,
Hand Stamp.

No. 106,716. Patented Aug. 23, 1870.

Fig 1.

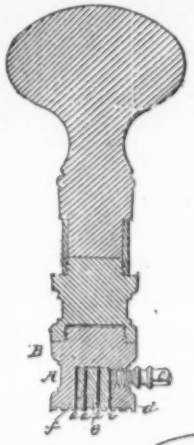


Fig 2.

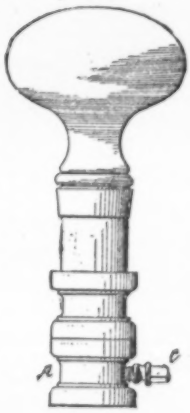
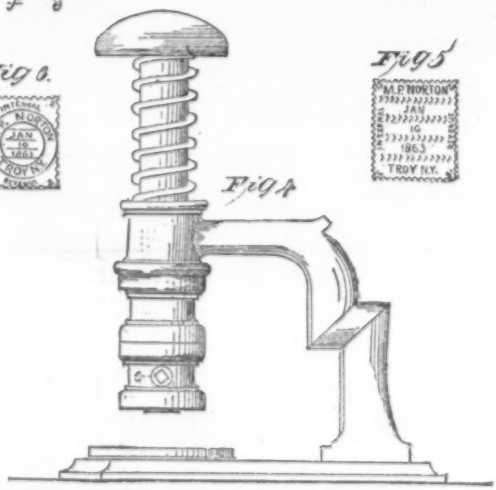


Fig 3

Fig 6.

Fig 5

Fig 4



Witnesses.
Fred Haynes
Edwa W. Dewey

Inventor.
Marcus P. Norton

1640

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James
v.
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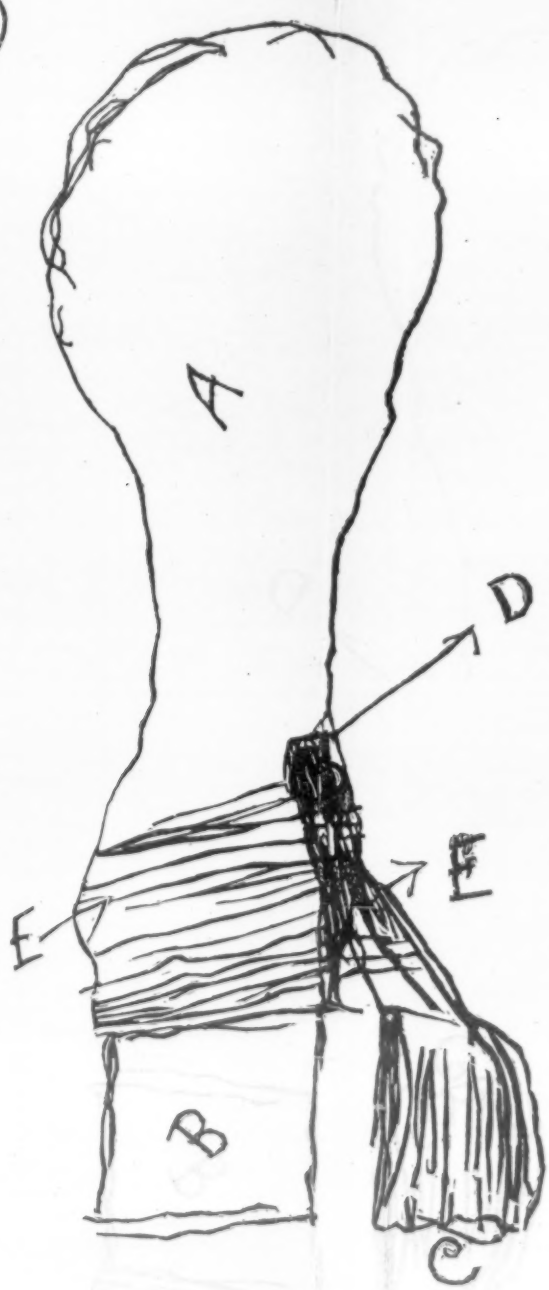
1214

1215

1216

Defendant's Exhibit No. 142, (John Rupp), March 11, 1878, C. P. T., Special Examiner.



Q. 17. Please do so. 1209

(Same objections as to preceding question. Witness makes drawing and produces it, and it is marked Defendant's Exhibit, No. 142 [John Rupp], March 11, 1878. C. P. T., Special Examiner.)

(Complainant's counsel here objects to the Examiner marking the so-called drawing in any form or for any purpose whatever in this cause; and assigns therefor the same objec- 1210
tions as last above stated.)

Q. 18. What do the letters "A, B, C, D and E," in this drawing, represent?

(Same objections as last above taken.)

A. "A" means the handle, "B" the steel stamp, "C" the wood canceller, "D" the cleft, "E" the cordage.

1211

Defendant's counsel offers drawing in evidence marked as above indicated.

(Here follows diagram marked page 1640)

1212

1646

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page 1646.

1237 Complainant's Exhibit "FF," March 11, 1878, referred to in witness's (John Rupp) answer No. 57, C. P. T., Special Examiner.

1238

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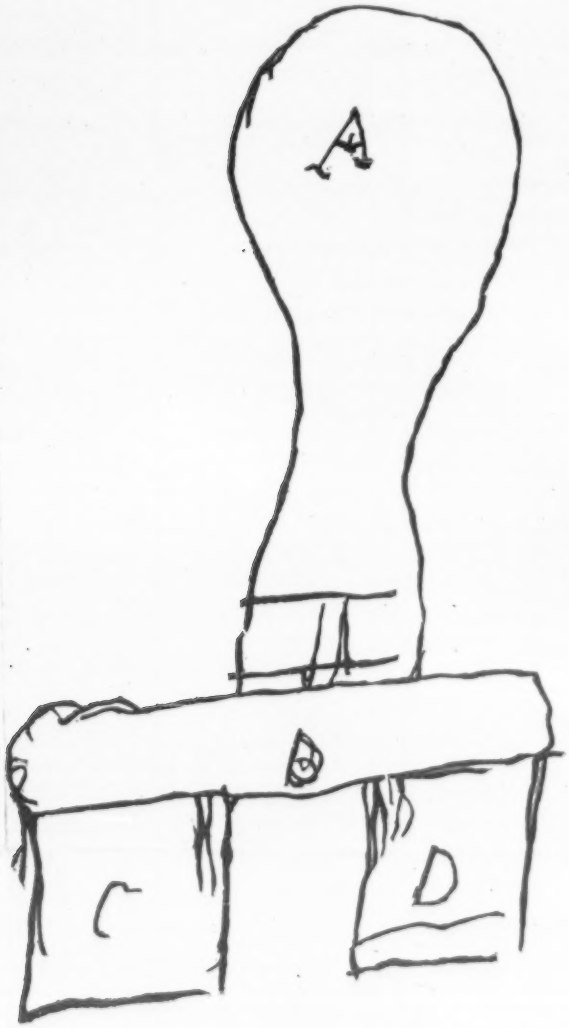

work and made a new one, on the same principle like the old one was." How much of that stamp did you make yourself, and what part or parts? 1233

A. This means the canceler which was made out of wood, and because the old one was worn out.

(The answer is objected to by counsel for complainant, from the words "because the old one was worn out," as not responsive to the question, being an interjection by the witness.)

1234

Q. 52. From whom did you obtain the post-marking stamp; I mean that stamp which had the name of the Post Office, the month and day of the month upon its acting surface?

A. This post-marking stamp I found, when I entered the service, in the office.

Q. 53. Do you know where it came from?

A. No, sir; it was in use when I entered the service.

Q. 54. Then it is not true that you "went to work and made a new one on the same principle like the old one was," is it? 1235

A. I made a new attachment to the old stamp, and not a new stamp entirely.

Q. 55. In what part of the year 1864 was that?

A. In the latter part.

Q. 56. Was Peter Hunt then living?

A. He was living then.

Q. 57. You say in that same answer to question three, "I used this until the Fall of 1865, when the Government furnished us with some new stamps." 1236 You've been kind enough, on your direct examination, to furnish defendant's counsel with a sketch of the one you made in the latter part of the year 1864, please be as kind and furnish me with a sketch of one of those "*new stamps*," and explain the same, when furnished.

(Witness furnishes the drawing, marked Complainant's Exhibit, F. F., March 11, 1878.)

(Here follows diagram marked page 1646)

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Deft's Exhibit No. 141.

H. F., Spl. Ex'r. March 6, 1878.

E. S. ZEVELY.

Fig. 1.

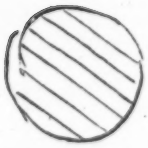

Fig. 2.

Fig. 3.

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~~639~~

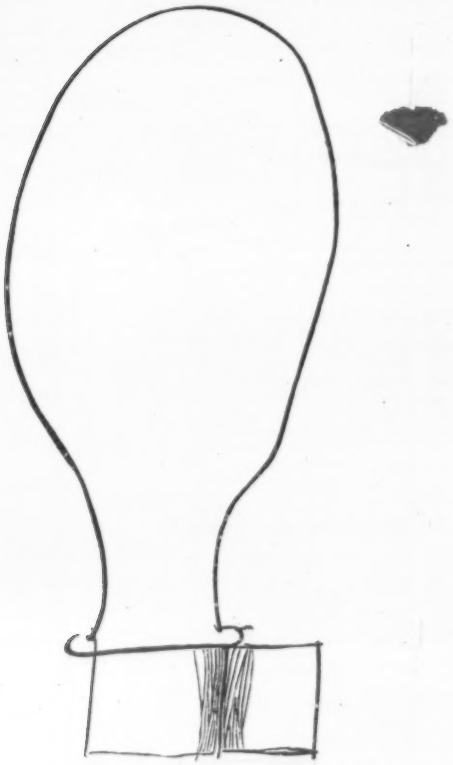
2553

Defendant's Exhibit 175—[JOHN ALBINGER.]

CLEVELAND, O., June 1st, 1878.

J. G. P., Special Examiner.

2554



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1977

2557 (Complainant's counsel objects to the introduction and reception in evidence of the proposed exhibit, and assigns therefor as reasons each and every of the objections taken with reference to questions proposed to this witness, and second, because it is an exhibit manufactured by defendant's counsel in the presence of the Examiner, and while the witness was under examination by the same counsel, and after he had stated in answer to question 7, I don't know that I can make an
2558 outline drawing of the instrument referred to in answer to question 6.)

12 Q. Did you see that instrument used in the Water street office?

(Same objections as taken to all other questions put to this witness.)

A. I did.

2559 *Cross-examination* by Mr. NORTON:

13 × Q. Are you now in the employ of the United States?

A. I am.

14 × Q. What is your salary?

A. A thousand dollars a year.

15 × Q. What are your duties in the Post-Office at this time?

A. Distributing mail.

16 × Q. How long have you been employed by the
2560 United States in the Cleveland Post-Office?

A. Over 20 years.

17 × Q. During that 20 years what have been your duties in the service of the United States in the Cleveland Post-Office, during each year of those twenty years?

A. That I can't tell you; each year is what gets me; I can't tell it exactly; if you want me to go ahead and give a straightforward statement I will do so; the first two years I was porter; than I was

2223

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13

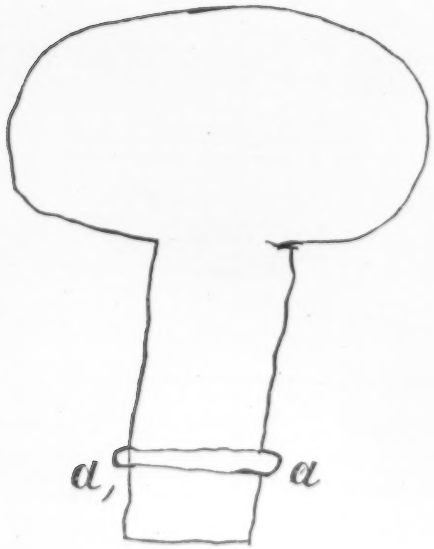
Deft's Exhibit No. 7.

J. A. S., Ex'r. January 15th, 1878.

14 JAMES RILEY.

15

16



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9

Deft's Exhibit No. 7.

J. A. S., Ex'r. January 7th, 1878.

JOHN A. DIX.

10

11

12

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No. 945
James
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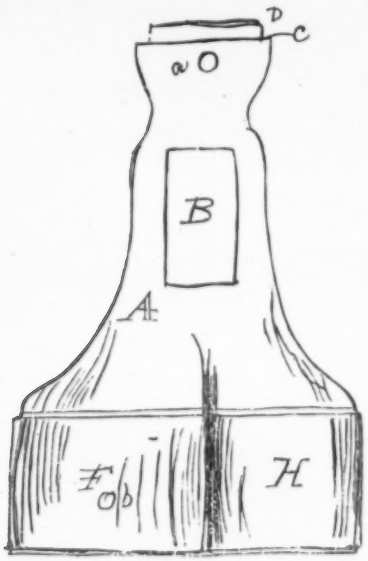
21

Deft's Exhibit No. 9.

J. A. S., Ex'r. January 18th, 1878.

22

23



24 *H* is the addition on the original Hamner Stamp, and was used to cancel postage stamps, leaving the marker *F* to perform its work on the envelope instead of on the postage stamps.

Jan. 18th, 1878.

EZRA MILLER.

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Deft's Exhibit No. 8. 17

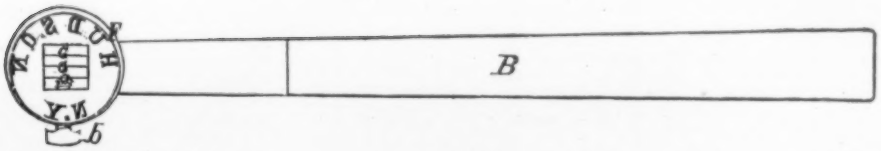
J. A. S., Ex'r. January 18th, 1878.

E. MILLER,

HAND STAMP.

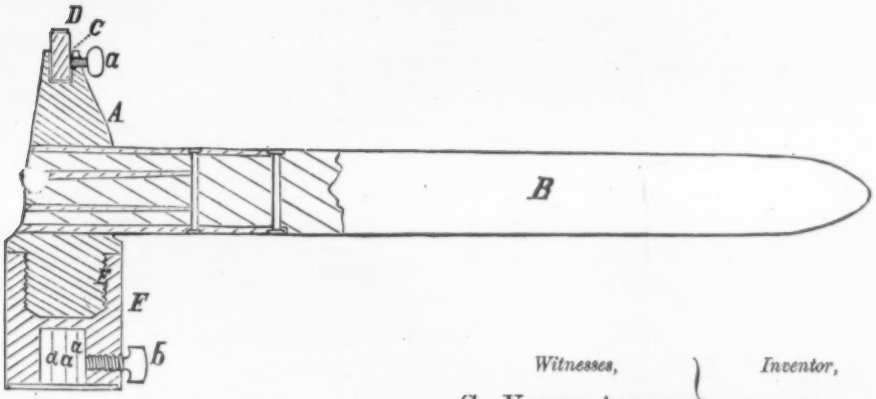
No. 23,307. Patented, March 22d, 1859.

FIG. 3.



18

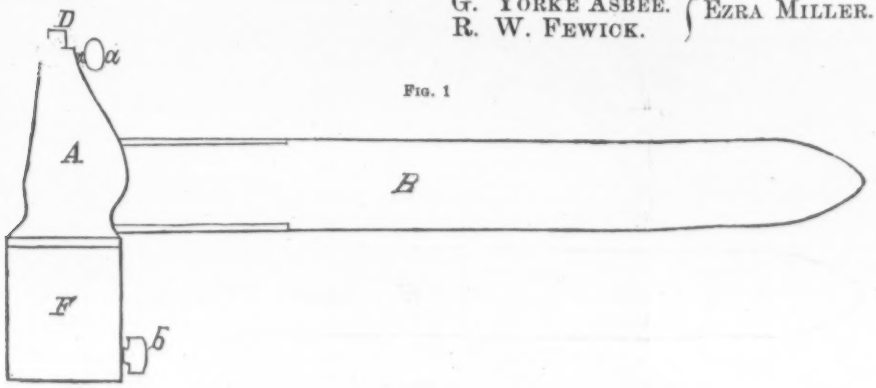
FIG. 2.



19

Witnesses, G. YORKE ASBEE. R. W. FEWICK. } *Inventor,* EZRA MILLER.

FIG. 1



20

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Deft's Exhibit No. 141.

H. F., Spl. Ex'r. March 6, 1878.

E. S. ZEVELY.

1090

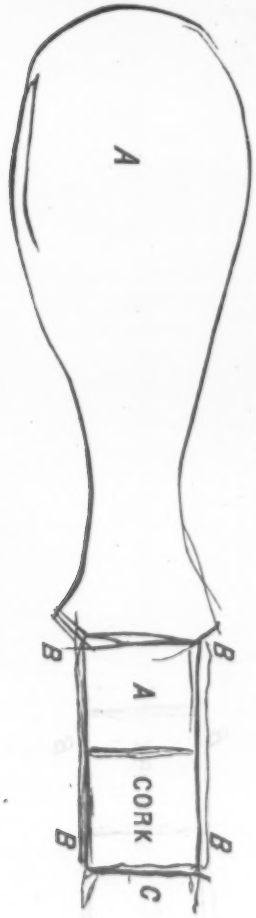

Fig. 1.

1091

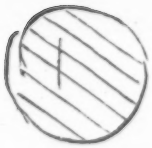

Fig. 2.

1092

Fig. 3.

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No. 945
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page 2474

1093 **Deft's Exhibit No. 142,**

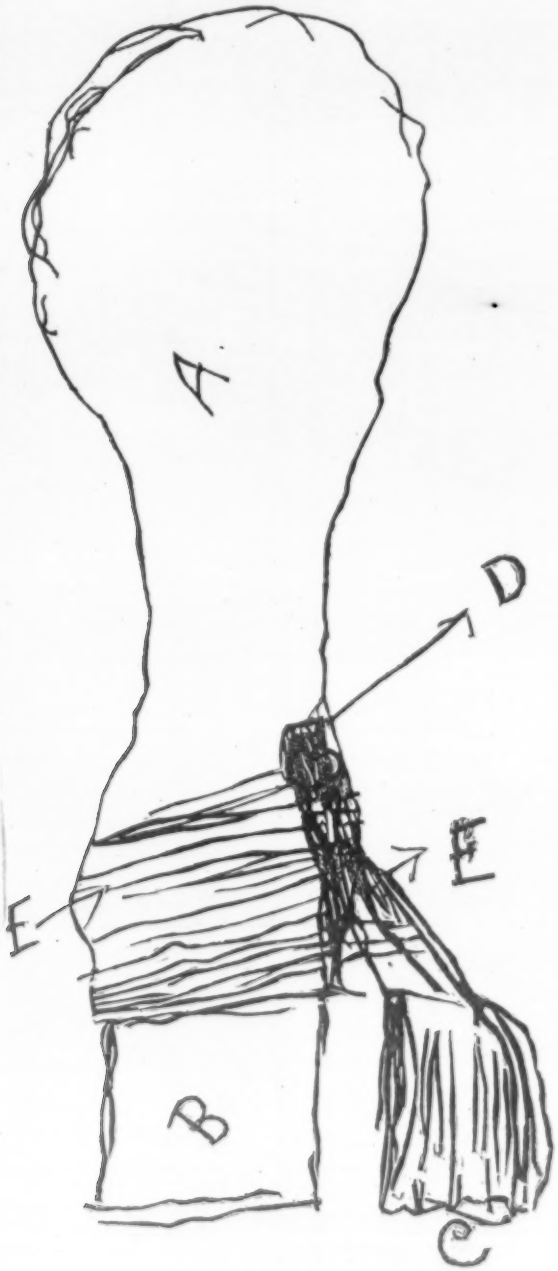
(John Rupp), March 11, 1878,

C. P. T., Special Examiner.

1094

1095

1096



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Campbell
page 2474

1093 **Deft's Exhibit No. 142,**

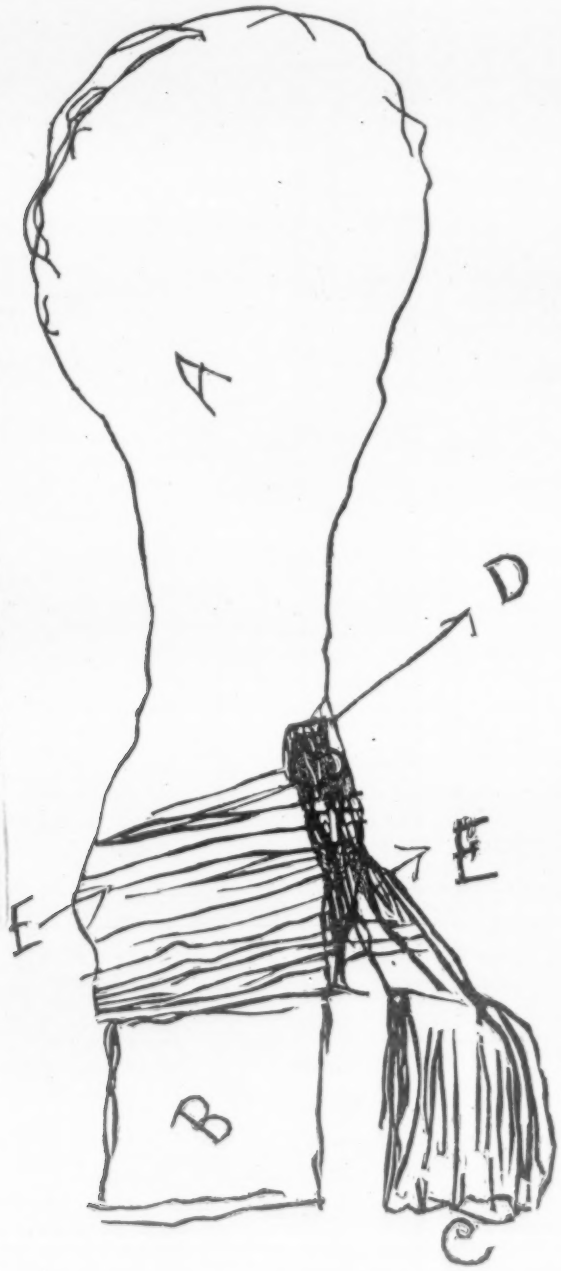
(John Rupp), March 11, 1878,

C. P. T., Special Examiner.

1094

1095

1096



2475

No. 9465 James v. Campbell } page 2475

M. P. Norton,

Hand Stamp.

No. 25,036.

Patented Aug 9 18

2475

No. 9465 James v. Campbell } page 24/25

M. P. Norton,
Hand Stamp.

No 25.036.

Patented Aug 9 18

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No. 9465
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M. P. Norton,
Hand Stamp.

No 37175 Patented. Dec. 16. 1863

Fig. 1.

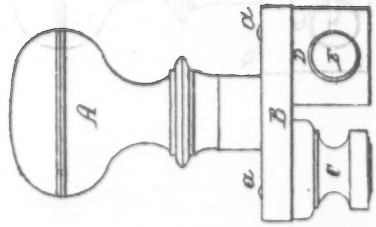


Fig. 2.

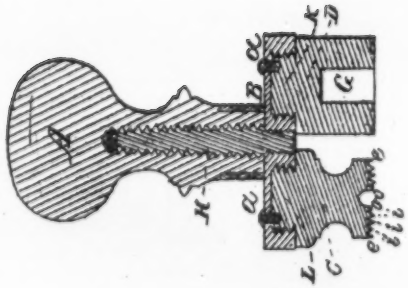


Fig. 3.

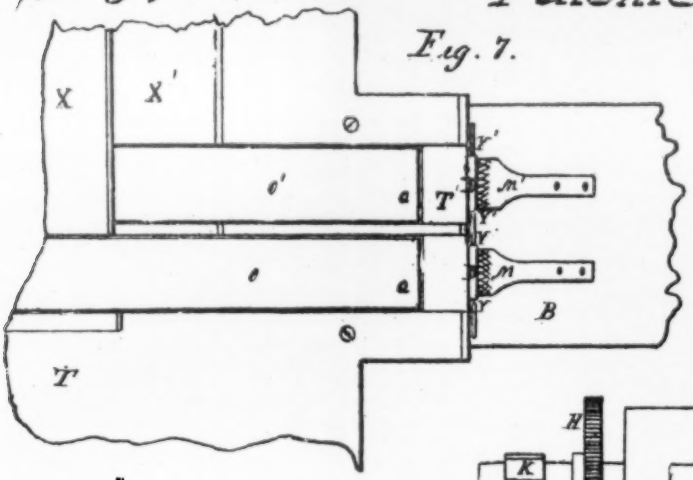
Fr. 945 James v. Campbell page 2446.

E. N. Moore. Sheet 2. 2 Sheets.

Hand Stamp

No. 6036 Patented Jan. 16. 1849.

Fig. 7.



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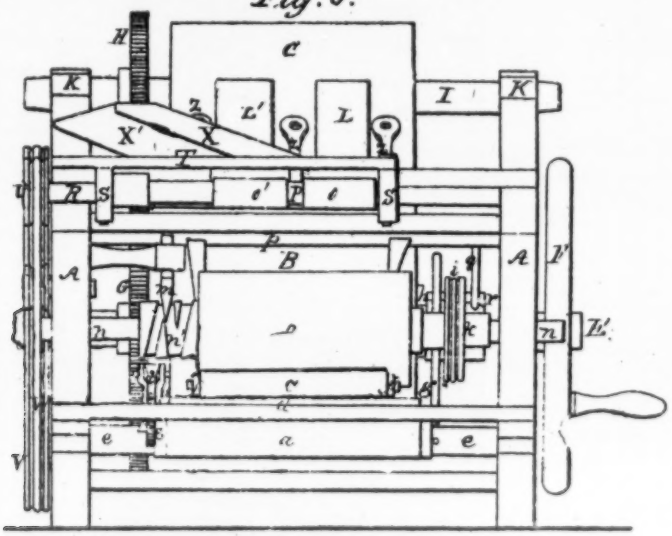
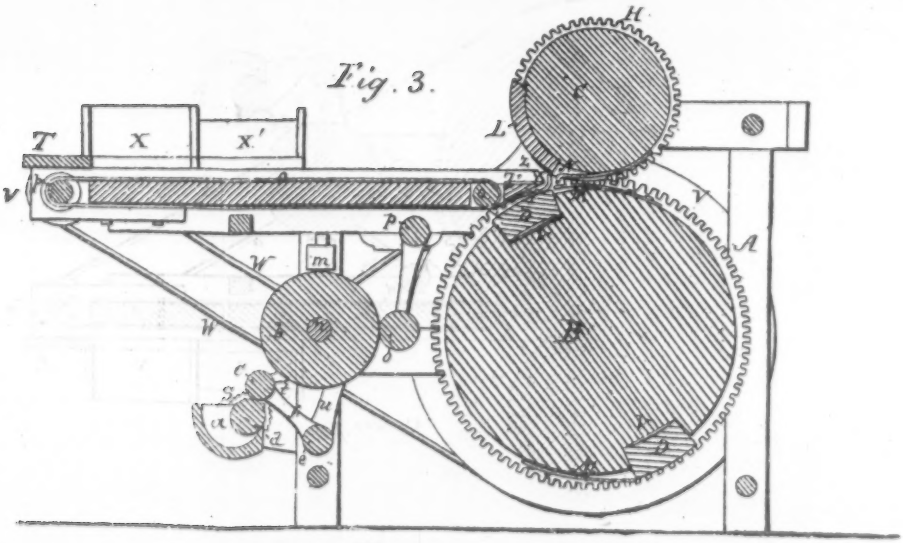


Fig. 3.



2 Y. 5 Vi. 945 James v. Campbell page 2449

E. N. Moore. Sheet 1 2 Sheets

Hand Stamp.

No. 6036 Patented Jan. 16. 1849.

Fig. 4.

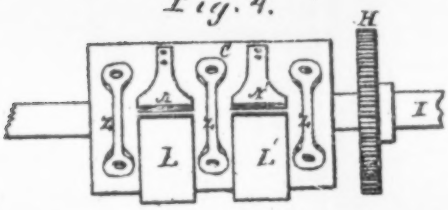


Fig. 5.

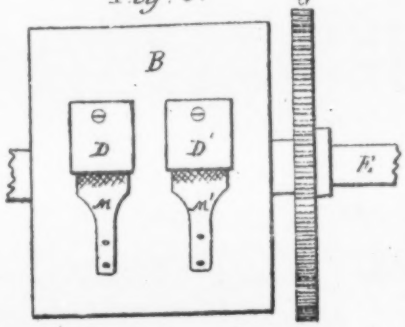
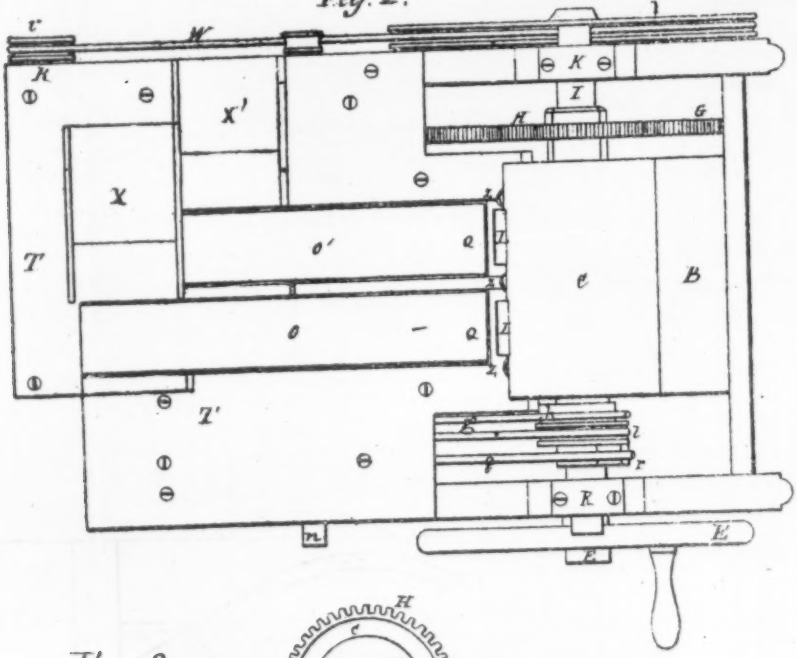


Fig. 1.



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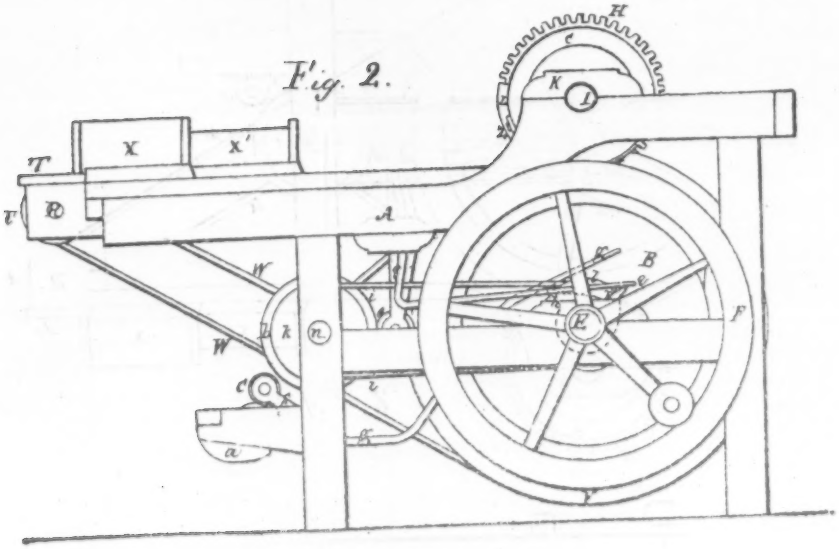


No. 945
James
v.
Campbell
page 2572

S. P. Ruggles',
Hand Stamp.

No. 13,270 Patented Aug. 21. 1855.

Fig. 1.

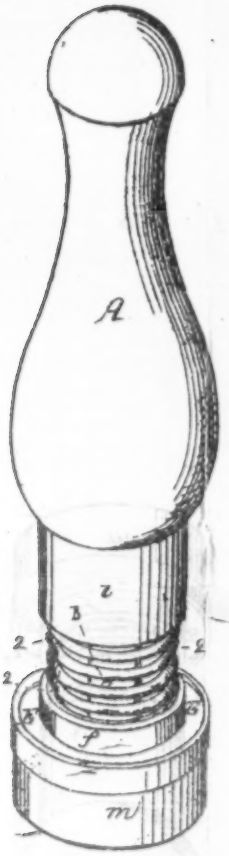
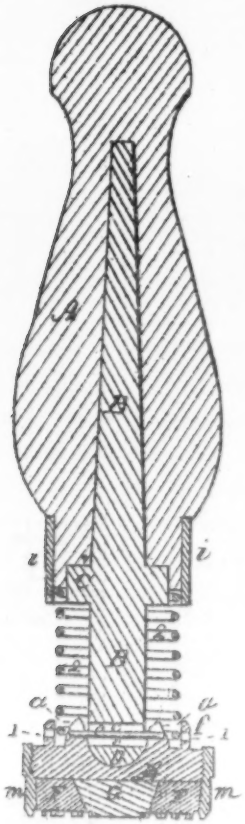


Fig. 2



2517
No. 945 James v. Campbell page 2517

E. Miller,
Hand Stamp.

No. 23,307. Patented Mar. 22. 1859.

Fig. 3.

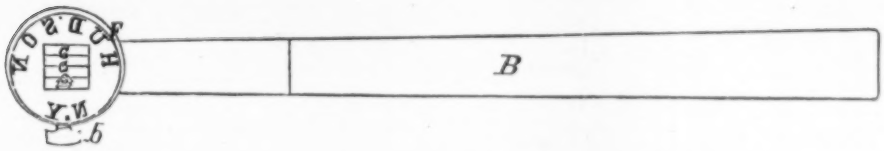
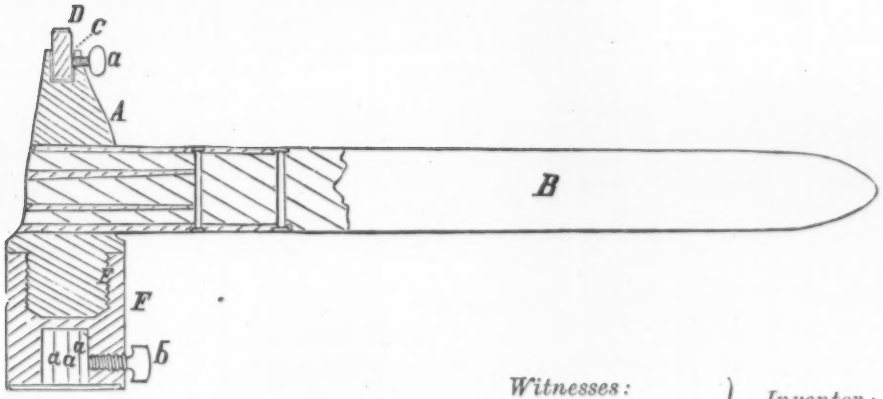


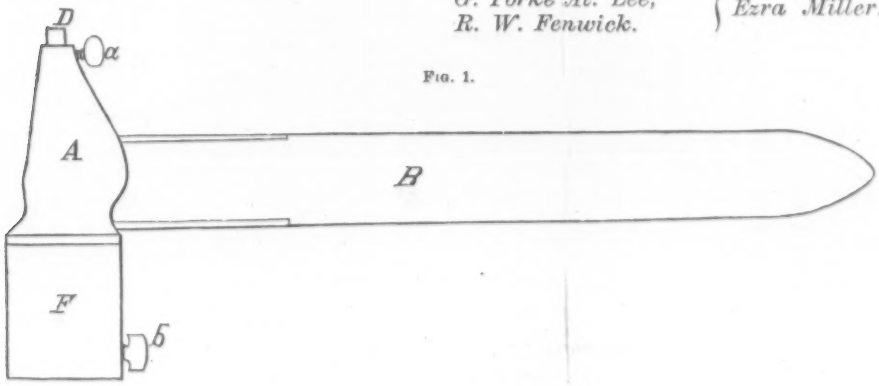
Fig. 2.



Witnesses:
G. Yorke At. Lee,
R. W. Fenwick.

Inventor:
Ezra Miller.

Fig. 1.



2534

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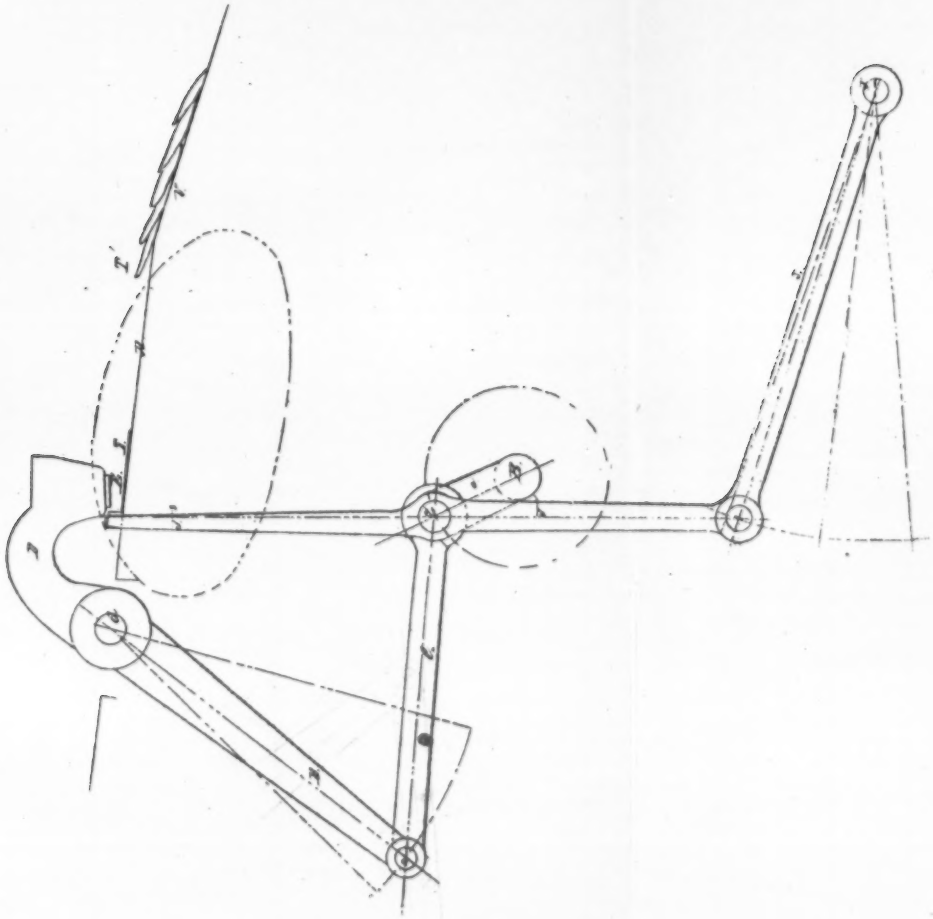
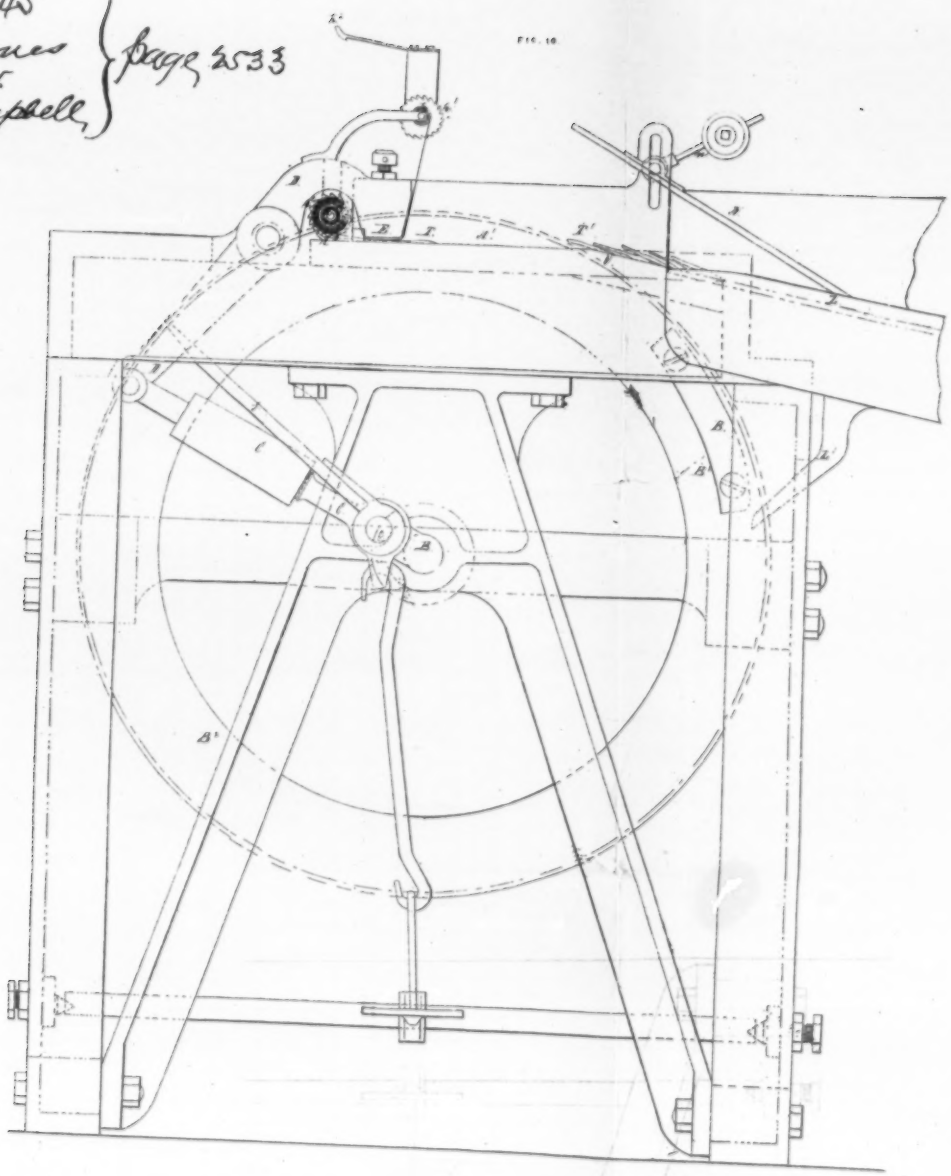
James
v.
Campbell
page 2534



2533

No. 945
James
v.
Campbell,
page 2533



2552

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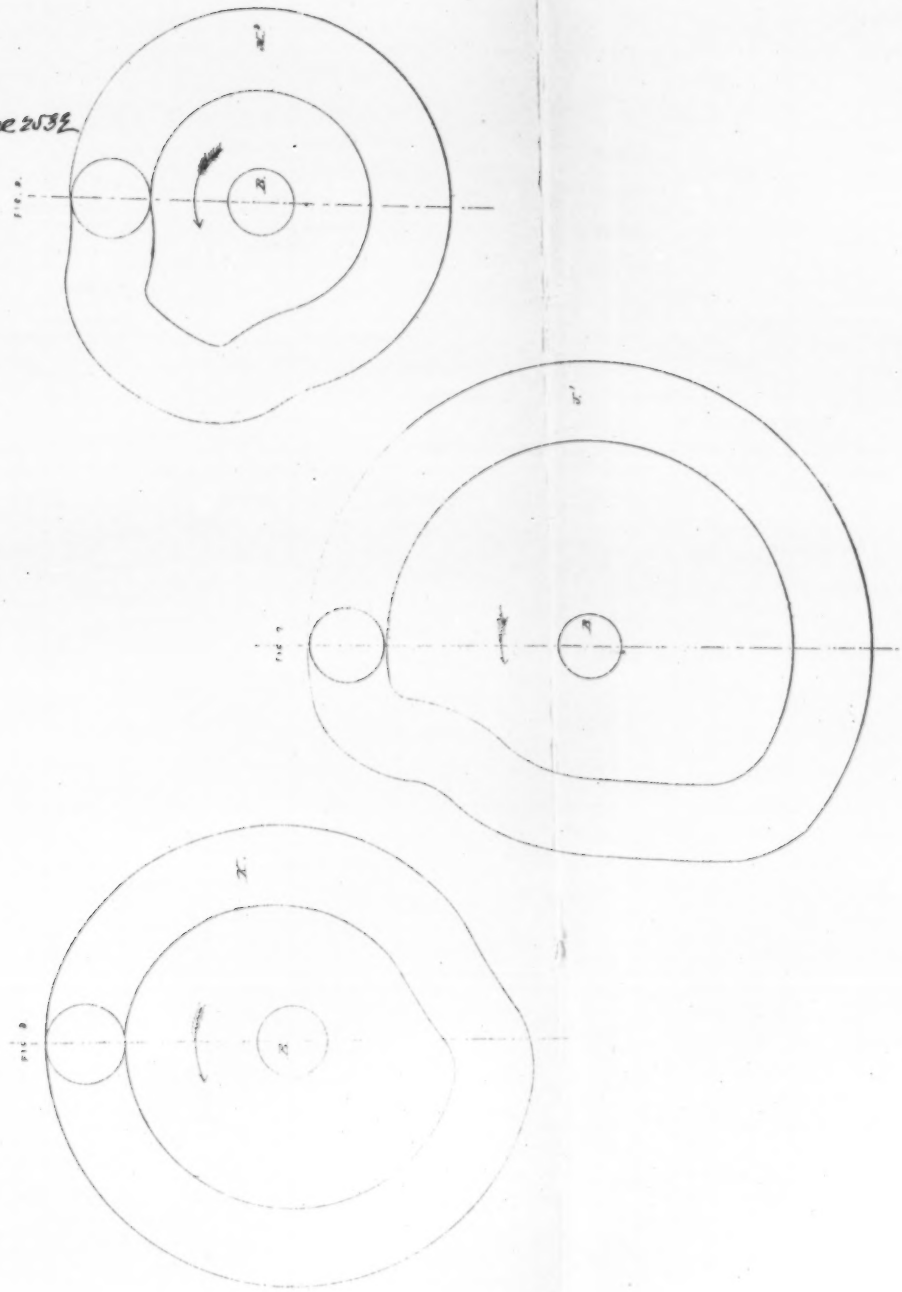
James
v.
Campbell
page 2532



2531

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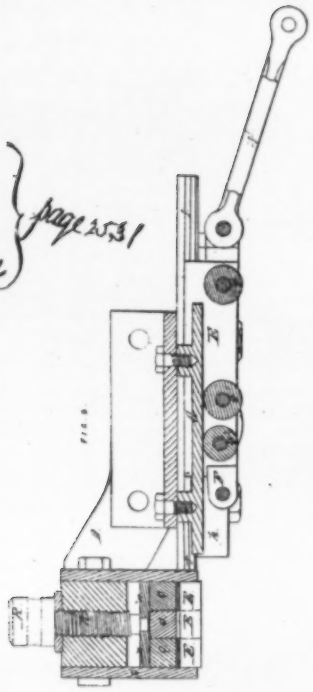
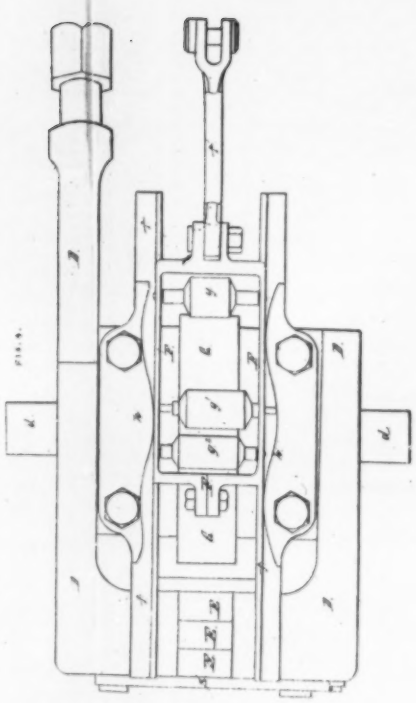
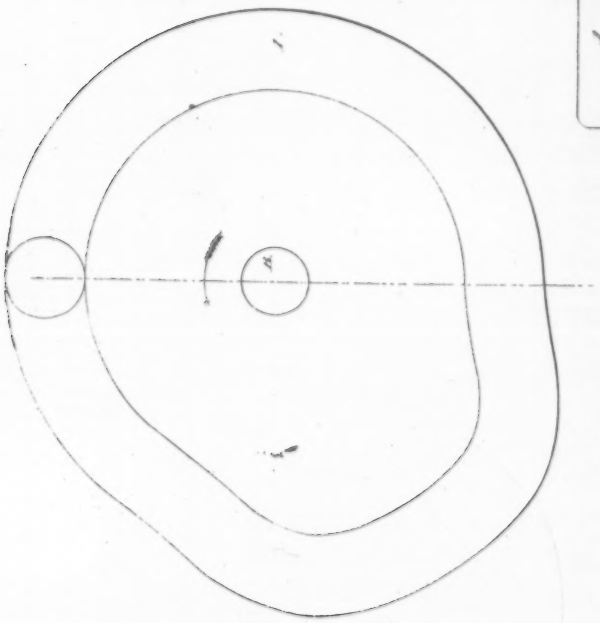
James
v.
Campbell
page 2531







2530

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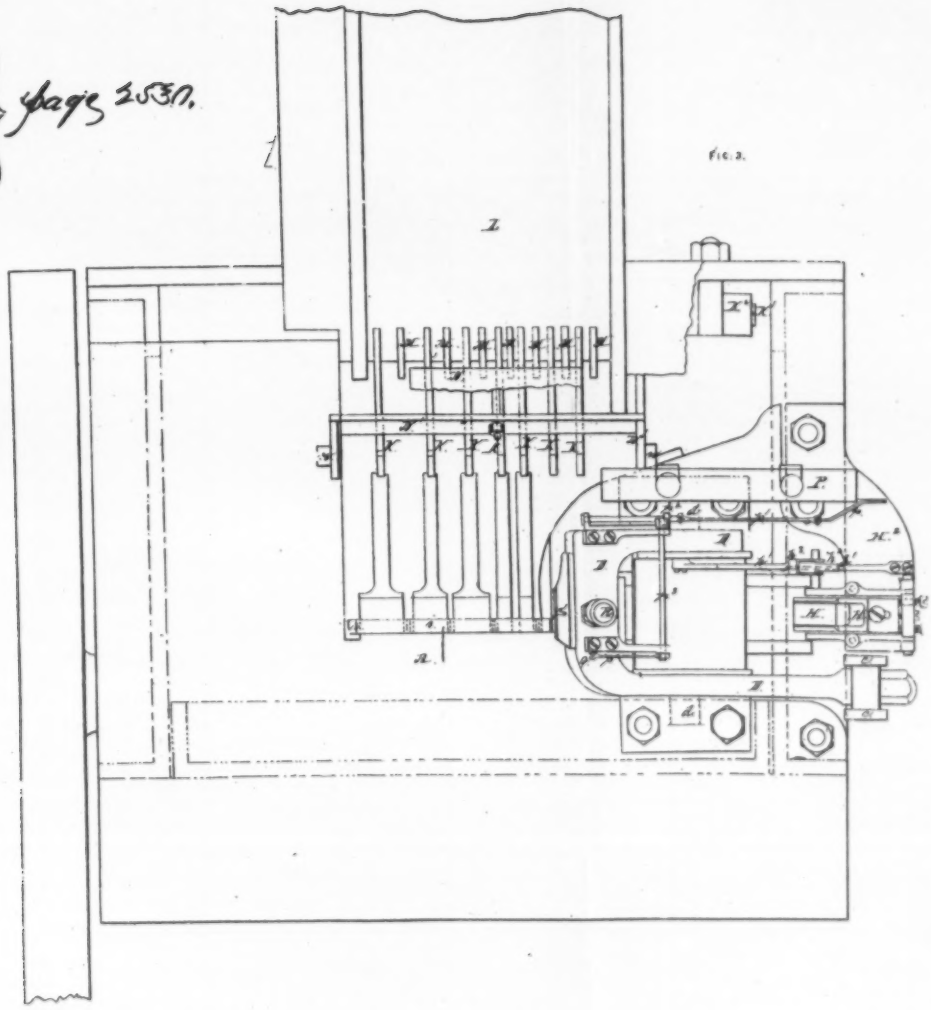
James
v.
Campbell
page 2530.



2529

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James
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Campbell
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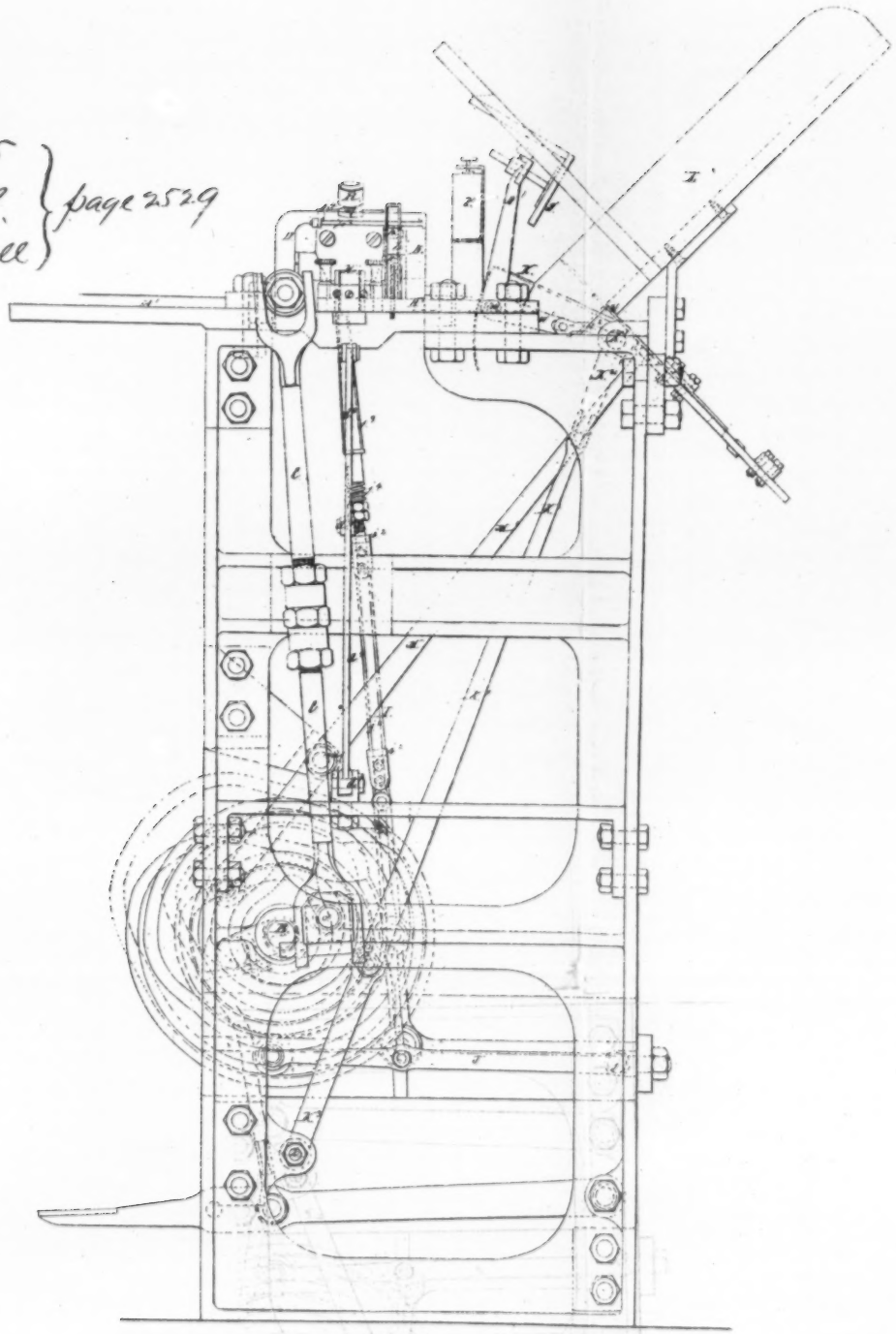
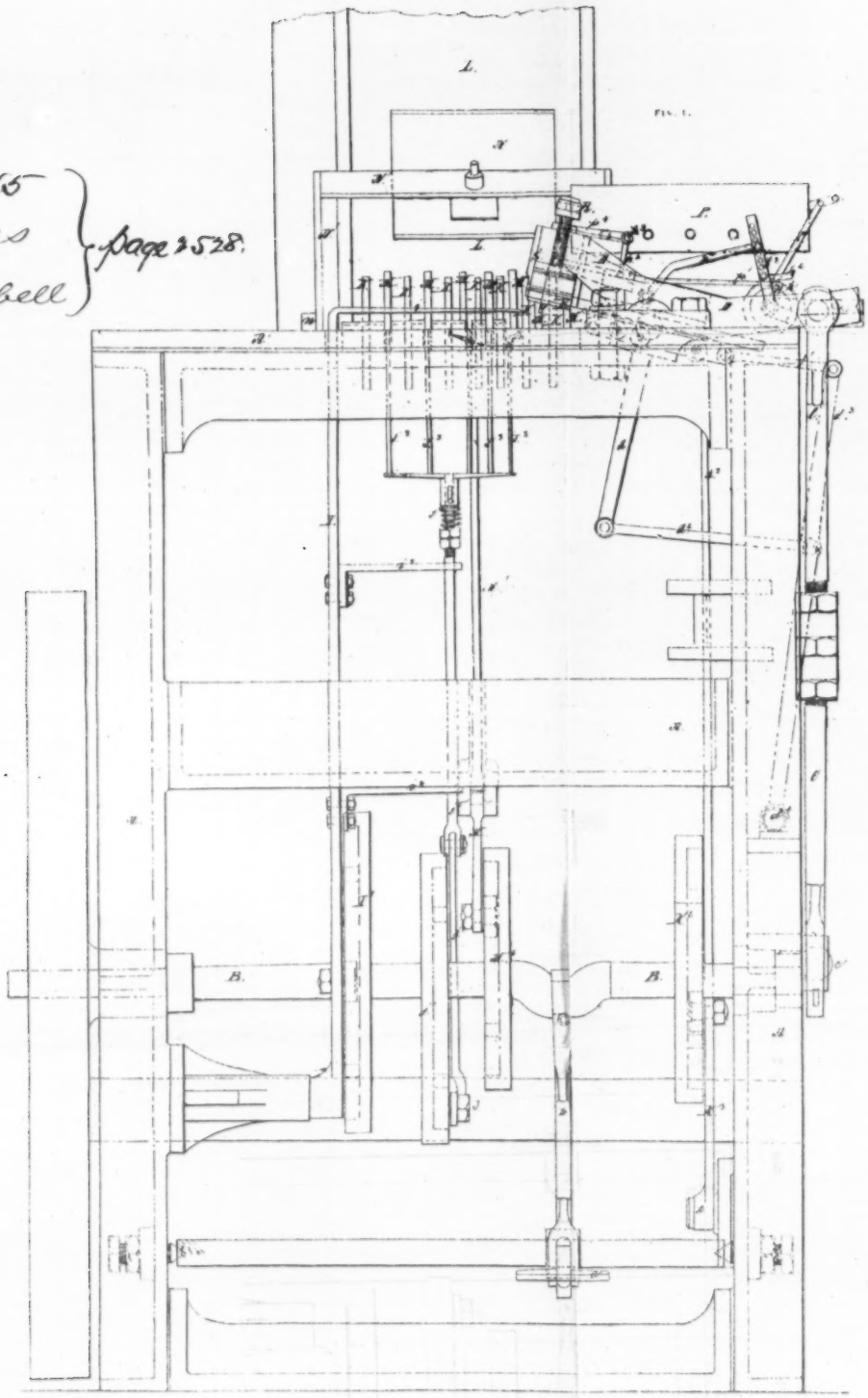


2528

No. 945
James
v.
Campbell
page 2528.



2477

No. 945
James
v.
Campbell
page 2548.

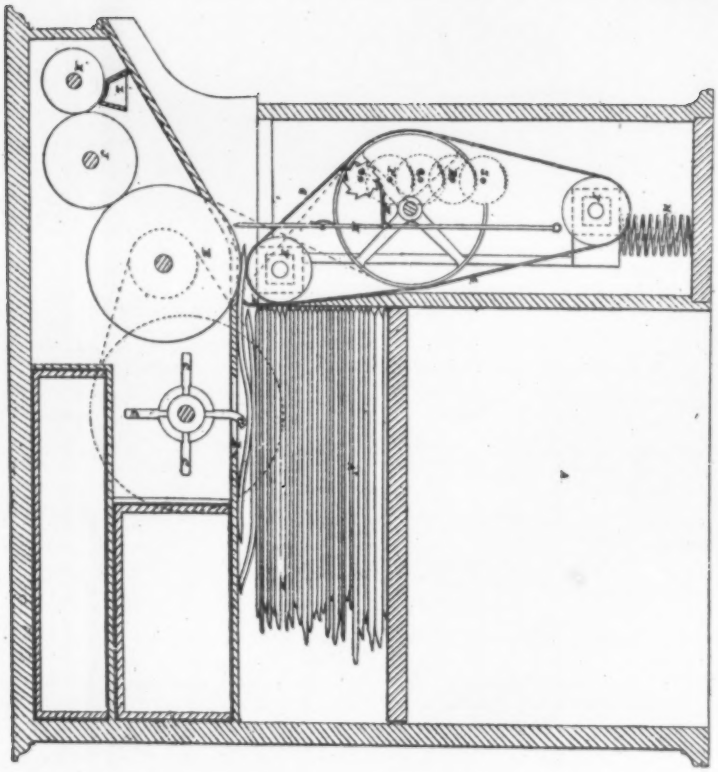


Fig. 1.

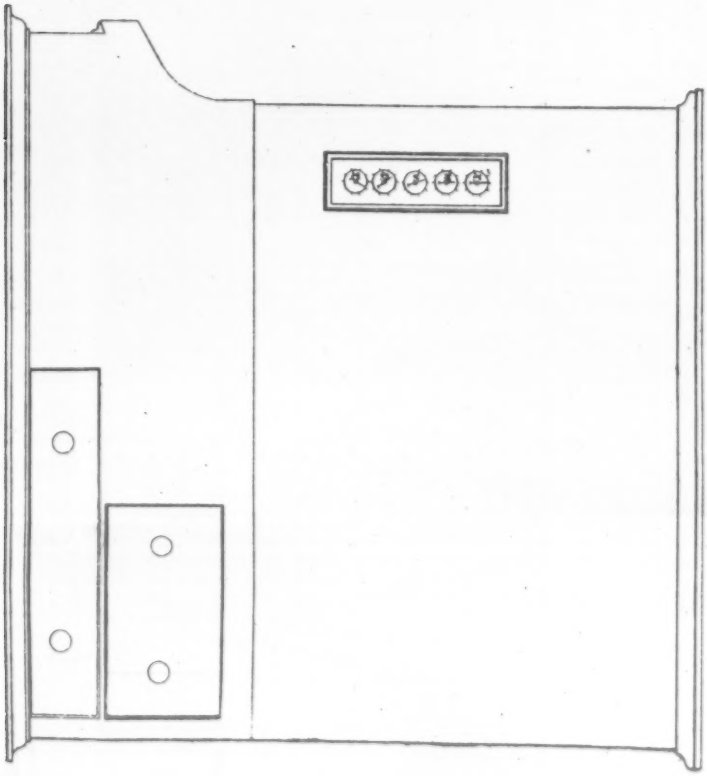


Fig. 2.

(Rec 9415

2640

1697

Rate.	UNPAID.			PAID HERE. By Stamps.			PAID HERE. In Money.			Free.
Cents	No.	Dolls.	Cents.	No.	Dols.	Cts.	No.	Dolls.	Cents.	No.
	2		10	3		3	4		12	1

This will hold 10 letters.

From

To WASHINGTON, D. C.

WEST POLTNEY, VT.
OCT. 13TH, 1853.
Paid 3 cts.
Unpaid 5 cts.
HENRY CLARK.

1698

1699

To the Commissioner
of Patents.

1700

2641

1701 **Deft's Ex. 161.**

April 1, 1878—J. A. S., Ex.

DEPARTMENT OF THE INTERIOR,

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the Records of this Office in relation to certain
1702 charges made against MARCUS P. NORTON, of Troy, New York, and the action of said Patent Office respecting the same.

In testimony whereof, I, W. H. DOOLITTLE, Acting Commissioner of Patents, have caused the seal of the Patent Office to be
[SEAL] hereunto affixed this ninth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and of
1703 the Independence of the United States the one hundred and second.

W. H. DOOLITTLE,
Acting Commissioner.

U. S. PATENT OFFICE,
Sept. 18, 1871.

The following charges were, on or about the day of their date, served upon Marcus P. Norton, of Troy, N. Y., a patent agent practicing before
1704 the United States Patent Office, to wit:

U. S. PATENT OFFICE,
WASHINGTON, D.C.,
Aug. 29, 1871.

To MARCUS P. NORTON,
Troy, N. Y.

Sir: You are hereby notified to appear before the Commissioner of Patents at his Office in Wash-

Rec 945

2638

1689

ONE LETTER FROM WEST POULTNEY, VT.

To (See opposite side.)

Unpaid, 5 cts.

H. CLARK, P. M.

1690

WEST POULTNEY, JULY 12, 1854. VT.

WEST POULTNEY, JUL. 7. VT.

WASHINGTON, D. C.

1691

ONE LETTER FROM WEST POULTNEY, VT.

To (See opposite side.)

Free.

H. CLARK, P. M.

1692

WEST POULTNEY, JULY 12, 1854. VT.

WEST POULTNEY, JUL. 7. VT.

NEW YORK, N. Y.

2C39

Rec 9115

1693

ONE LETTER FROM WEST POULTEY, VT.

To (See opposite side.)

Paid in Money, 3 cts.

H. CLARK, P. M.

1694

WEST POULTNEY, JULY 12, 1854. VT.

WEST POULTNEY, JUL. 7. VT.

BOSTON, MASS.

1695

ONE LETTER FROM WEST POULTNEY, VT.

To (See opposite side.)

Paid by Stamp, 3 cts.

H. CLARK, P. M.

1696

WEST POULTNEY, JULY 12, 1854. VT.

WEST POULTNEY, JUL. 7. VT.

BALTIMORE, PA.

2668

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FIG. 1.

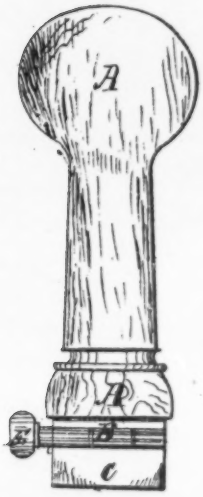


FIG. 2.

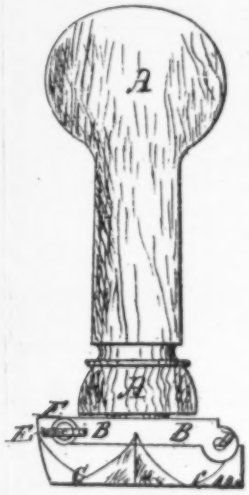


FIG. 7.

FIG. 3.

FIG. 8.

FIG. 4.

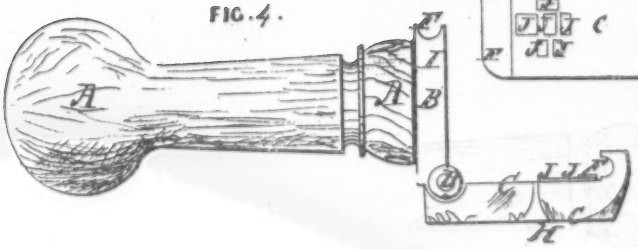


FIG. 5.

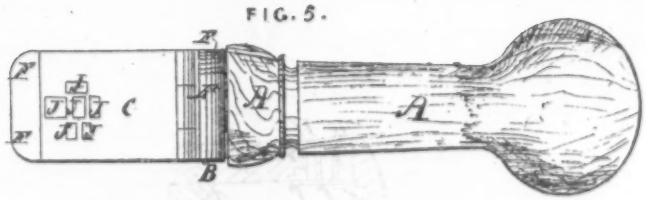
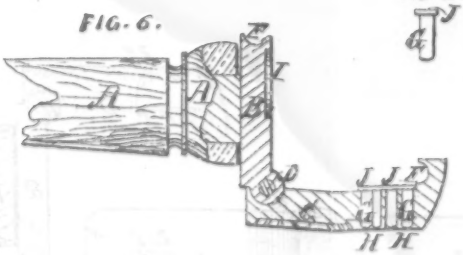


FIG. 9.

FIG. 10.

FIG. 6.



2673 No. 945 James v. Campbell } page 2673.

T. J. W. Robertson.

Hand Stamp.

No 18249. Patented Sept 22 1857.

Fig 2

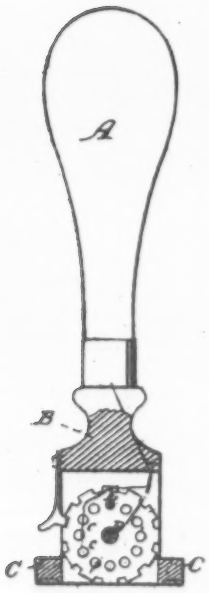


Fig. 1

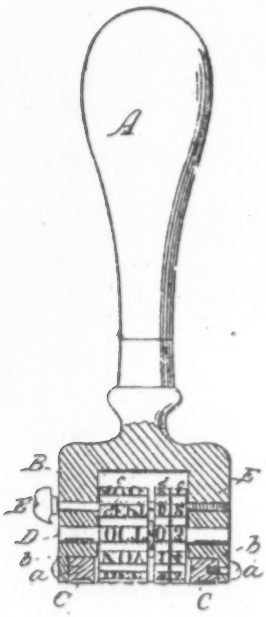


Fig 3

2678

The red portion in Fig. 2 shows the method of applying such spring. Various other modes of locking the type wheels can be adopted without substantially changing the construction of the article. 1841

I do not claim, broadly, the employment of revolving type wheels for making impressions; for I am aware that such wheels have long been known and used. They are seen, for example, in nearly all book-paging machines.

But to the best of my knowledge and belief no hand stamp like mine has ever been known or used. 1842

Therefore, having thus described my invention, what I claim as new and desire to secure by Letters Patent is, the construction of Hand Stamps in the manner herein described and represented.

July 9th, 1857.

T. J. W. ROBERTSON.

Witnesses:

A. E. BEACH,
W. TUSCH.

Ex'd.—H. M. H.
C. K.

1843

(Here follows diagram marked page 2679)

1844

2679

1845

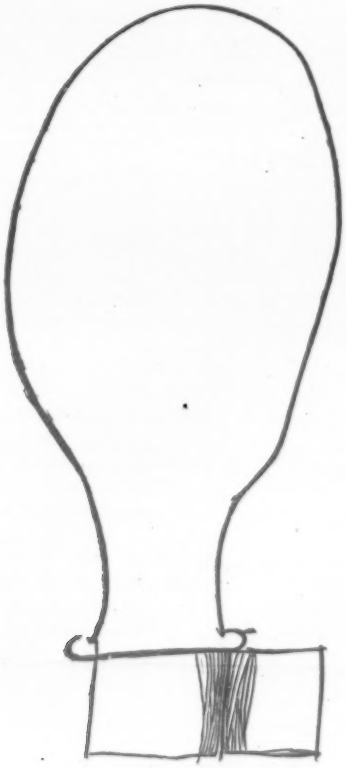
Defendant's Exhibit 175—[JOHN ALBINGER.]

No. 945 James v. Campbell page 2679

CLEVELAND, O., June 1st, 1878.

J. G. P., Special Examiner.

1846



1847

1848

2687

Rec 945.

~~452~~

1877

MARCUS P. NORTON'S

POST-MARKING

AND

POSTAGE STAMP CANCELLING DEVICE,

1878

PATENTED APRIL 14, 1863, RE-ISSUED AUGUST 3, 1869, AND ANOTHER LETTERS PATENT DATED JULY 13, 1869, ANTE-DATED JUNE 10, 1869.

THIRD ASST. P. M. G. May ~~Mar.~~ 23, '78. P. O. D.

OFFICE OF THE POSTMASTER GENERAL. MAY 23, 1878. WASHINGTON, D. C.

APPLICATION TO THE

1879

HON. POSTMASTER GENERAL,

FOR COMPENSATION FOR THE USE OF THE SAID INVENTION UNDER SAID PATENTS BY THE POST OFFICE DEPARTMENT.

POINTS AND ARGUMENTS

1880

IN SUPPORT OF THAT APPLICATION.

WASHINGTON.
CUNNINGHAM & McINTOSH, PRINTERS.
1869.

268

~~451~~

1873

1874

Defendant's Exhibit 183.

(NORTON'S PAMPHLET)

TROY, July 30, 1878.—J. B. EXR.

POST OFFICE DEPARTMENT,
WASHINGTON, D.C., May 24th, 1878.

I certify the annexed pamphlet to be an original paper taken from the files of this Department.

1875

D. M. KEY,

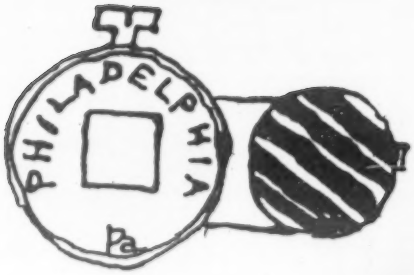
[SEAL.] *Postmaster General.*

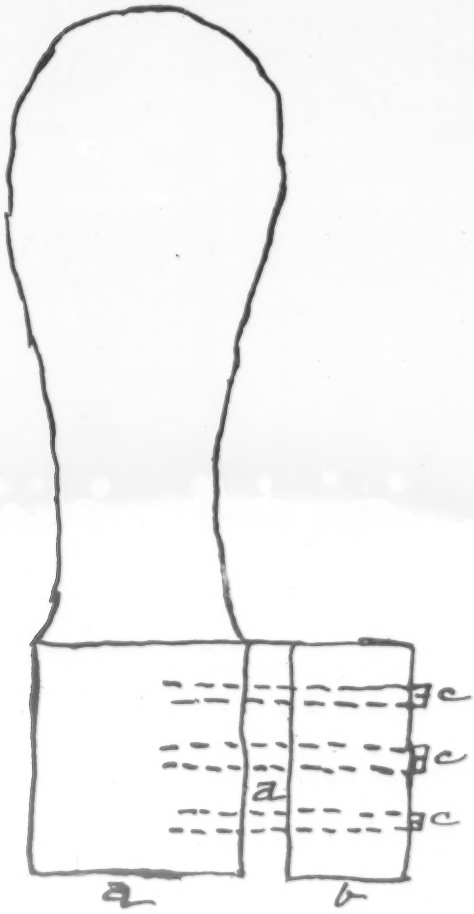
1876

No. 945
James
v.
Campbell
page 2789 Fig. 2

2789

Fig. 1





Defendant's Exhibit
No. 203
of Ireland
June 17, 1879. N.M.K.

2762

Fig. 3

Fig. 1

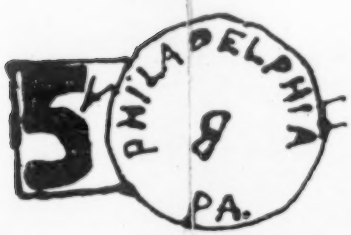
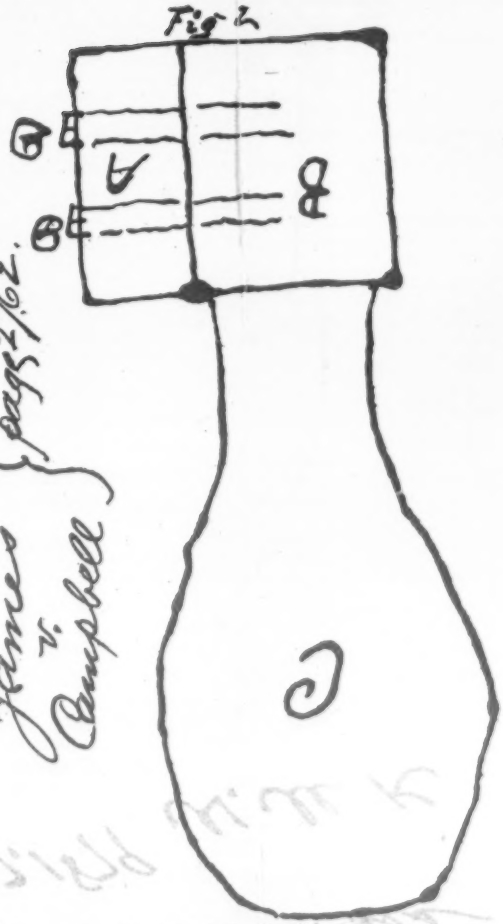


Fig. 4

Fig. 2



No. 945 James v. Campbell } pages 2762.

Defendant's Exhibit 20 in Reply
June 17, 1879
W. M. K